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International Court of Justice

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OFFICIAL TRANSCRIPT OF THE INTERNATIONAL MILITARY TRIBUNAL IN THE MATTER OF THE UNITED STATES OF AMERICA, THE FRENCH REPUBLIC, THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, AND THE UNION OF SOVIET SOCIALIST REPUBLICS AGAINST HERMANN WILHELM GOERING ET AL, DEFENDANTS, SITTING AT NURNBERG, GERMANY ON 9 JULY 1946, 1000-1300, LORD JUSTICE LAWRENCE PRESIDING.

THE MARSHAL: May it please the Tribunal, the defendants Hess and Fritsche are absent.

THE PRESIDENT: I have an order to read. The Tribunal orders:

1. Applications for witnesses for organizations to be heard by the Tribunal in open court in accordance with Paragraph 5 of the Tribunal's order of March 13, 1946 should be made to the General Secretary as soon as possible, and in any case not later then the 20th of July.

2. The Tribunal believes that so much evidence has already been taken and so wide a field has been covered that only a very few witnesses need be called for each organization.

That is all.

DR. NELTE (Counsel for the defendant Keitel): Mr. President, gentlemen of the court, yesterday I treated the problem of Keitel and the Russian campaign, and I remind you of what Keitel has said in the witness box concerning the so-called ideological orders, "I knew their content. In spite of my objections I passed them on without the possibility of serious consequences deterring me."

I wanted to point that out in order to make more clear that which I have to say now. It is on page 112, the fourth paragraph.

Thus the opinion was created in the course of time and disseminated through the entire army that Field Marshal Keitel was a "yes man", a tool of Hitler that he was betraying the interests of the Wehrmacht. These generals did not see and were not interested in the fact that this man maintained a constant battle day after day over all possible problems with Hitler and the forces which influenced him from all sides.

This picture which definitely did not apply to Keitel, especially not in the sphere of strategic operations, planning and execution, as has been stated here in detail, became a distorted picture which has maintained its effect

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up to and in these trials, maybe not without the fault of the defendant Keitel. About the justification of his conception of duty there can basically be no argument. It has been confirmed here by the witness Admiral Schulte-Mentin to be true for the defendant Grand Admiral Raeder, too. There can be no doubt that the other admirals and generals took basically the same point of view, that it is impossible in the military sphere to criticize before subordinates the decision of a superior as expressed in an order, even if one has scruples against the order oneself.

One may say that every principle, every basic rule must be interpreted and used in a reasonable way, that every exaggeration of a good principle means its devaluation. In the case of Keitel this objection touches the problem of his responsibility and guilt altogether.

Does the non-recognition of the point, where a principle in itself correct is being exaggerated and in this way endangers the goods for the protection of which it has been established, constitute guilt ?

In the case of Keitel we must consider the root of this soldierly principle. The thoughts and ideas which the defendant Keitel had in this connection were the following:

It is undeniable that the principle of obedience is necessary for all armed forces; one may say that obedience -- a virtue in civilian life and therefore more or less unstable in its application -- must be the essential element of the military character, because without this principle of obedience the aim which is to be accomplished by the armed forces could not be accomplished.

This aim, the security of the country, the protection of the people, the maintenance of the most valuable national possessions,

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is so sacred that the importance of the principle of obedience cann t be evaluated high enough. From this spri s the duty for those who are called upon to preserve that national instrumen the Wehrmacht, within the scope of its higher task, to emphasize the importance of obedience. But what the General demands of the soldier, because it indispensable, must remain in force for himself, too. The same applies to the principle of obedience.

It would now be dangerous to relax order or even an essential principle by from the beginning pointing out ex erations and taking them into consideration. Such relaxati n would leave the principle of decision to the individual which means to his judgment. There ght be such cases, where the decision depends or must be made dependent on actual circumstances. In principle, such relaxation would lead to devaluation, even to the abrogation of the principle. In order to prevent this danger and to eliminate any doubt as to its absolute importance, the principle of obedie e has been changed in military life into one of "absolute obedience" and embodied in the military oath. This, too, is valid for the General as well as for the common soldier. The defendant Keitel has not only grown up in the ways of thinking, but in the 37 years of his military service (up to 1938), among it in the first World War, he had also come to the conviction that this rinciple of obedience is the strongest pillar upon which the Wehrmacht rests and with it the security of the country.

Deeply imbued with the importance his profession, he had served the Kaiser, Ebert, and von Hindenburg in accordance with this principle.

But while they, as the representatives of the State, had in some way an impersonal and symbolic effect on Keitel, Hitler, from 1934, at first appeared the same to him, i.e., without any personal touch, in spite of the fact that his name was mentioned in the military oath, but only as representative of the State. In 1938. Keitel as Chief of the OKW came into the immediate circle and the personal sphere of activity of Hitler. It would appear to be important for the further development and for the judging of Keitel, to realize that Keitel was now exposed to the direct effects of Hitler's personality, due to the soldierly conception of duty which was especially developed in him, and due to the pronounced feeling for soldierly obedience.

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I incline to the assumption that Hitler had clearly realized, in the preliminary discussions with Keitel which led to the Fuehrer order of 4 February 1938, that Keitel was a personality such as he had included in his calculations:

"A man upon whom he could rely as soldier at any time; who was devoted to him in convinced soldierly faithfulness; who could by his appearance, worthily appear for the Wehrmacht in his environment, i.e., for purposes of representation; who by reason of his power of judgment, was an extraordinary organizer, (according to the report of Field Marshal v. Blomberg).

That Hitler consequently strongly influenced this man who really admired him, and that he brought him completely under his charm is a fact which Keitel himself has admitted.

It must be remembered, if one wishes to understand how it could happen that Keitel made out and forwarded orders of Hitler which were incompatible with the traditional conception of a German officer, as for instance the orders C 50 and C 51 and others, which were submitted by the Soviet Russian Prosecution. By the exploitation of the readiness for action for Germany, which was presumed to be a matter of course for all Generals, Hitler understood how to camouflage his party-political aims with the defense of national interests, and to present the pending fight against the Soviet Union as an inevitable dispute, even as a defensive war, imposed by positive news reports, in which it was a question of to be or not to be for Germany.

Therewith Hitler asked the fateful question.

That the considerations of the old officer nevertheless saddened him (Keitel) and that he repeatedly raised objections to the drafts of the orders, although without success, that has been confirmed by General Jodl here in the witness box.

During the cross-examination by the representative of the American Prosecution the defendant Keitel has openly stressed that he was conscious of the criminal nature of these orders, but that he had believed himself to be unable to evade the instructions of the Supreme Commander of the Army and of the Head of the State whose final word against all objections was:

"I do not know why you are worrying; after all, you have no responsibility. Only I have it towards the German people.

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This is the analysis of Keitel's attitude towards the so-called ideologically qualified orders of Hitler.

Keitel's last, and in many cases justified hope was that the commanders-in-chief and subordinate commanders of the Wehrmacht would in practice either not apply at all or only moderate these hard and even inhuman orders within the framework of their judgment and their responsibility. In his position, Keitel had only the choice of military disobidience by refusing to forward the orders or of the carrying out of the instruction to forward the orders. Whether and what else he could or should have done, I shall examine in another connection. The question here is to make clear how it happened that Keitel forwarded orders which undeniably violated the regulations of land warfare and humanity, and that he did not recognize the point at which even the strict duty of the soldier to obey must end, by reason of his duty to obey, of his sworn faithfulness to the Supreme Commander, and of the fact that he saw in the order of the Head of the State the absolution of his own responsibility. All soldiers who appear here as defendants or as witnesses have referred to the duty of allegiance. They all, even so far as they sooner or later recognized that Hitler had drawn them and the Wehrmacht into his egocentric and risky game, have considered the oath of allegiance as given to their country, and have believed that they must continue their duty under circumstances which must appear inconceivable to us and to themselves, after realising the resulting disaster. Not only soldiers like Raeder, Doenitz, and Jodl, but also Paulus have kept their positions and have remained in their posts, and we have heard the same from other defendants, too. The statements of the defendants Speer and Jodl in this connection were deeply moving.

It must be examined as to whether these facts relieve the defendant Keitel of a punishable responsibility. Keitel does not deny that his is a heavy moral responsibility. He has recognized that whoever played even the small part in this terrible drama, cannot feel himself free from a moral guilt in which he was entangled.

If I nevertheless emphasize the legal point of view, I am so doing because Justice Jackson has expressly referred in his speech for the Prosecution, to law as basis of your verdict to International Law, the law of the individual States, and to the law which the victorious Powers have embodied in the Stat

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I herewith state that the defendant Keitel has recognized that some of Hitler's orders violated International Law. The Statute has determined that a soldier cannot refer to an order of a superior or of a Government in order to clear himself. At the beginning of my statement I have asked you to examine whether independent of the terms of the Statute, the principle is unimpeachable that the standard for what is right or wrong can be settled on a national basis only.

THE PRESIDENT: Dr. Nelte, I see that in the next few pages you pass into the realm of metaphysics. Do you not think that part you might leave for the Tribunal to read ?

You must remember that you began your speech yesterday before the morning adjournment and you have got over seventy pages left of your speech to read.

DR. NELTE: I have limited it and I shall be through by lunch time.

THE PRESIDENT: Very well, Do you think it is necessary to read these passages about metaphysical forces and the individual cannot detach himself from that.

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Yes, I shall have to recommence page 121. Just before that I come to Hitler's character. Perhaps I may just read from page 120 at the bottom.

THE PRESIDENT: Very well, ? you tell the Tribunal that you have limited your presentation. I think you began yesterday at a quarter past twelve. Go on then. Take your own course, but do your best to limit it, and go to page 120 now.

DR. NELTE: I am coming to paragraph three on page 120.

Hitler was the exponent of an idea. He was not only the representative of a party political program, but also of a philosophy which divided him and the German people from the ideology of the rest of the world. All toleration and all compromise were unknown to him as a convinced enemy of the parliamentary democracy, possessed by the idea of the correctness of his idealogy. This led to an egocentric ideology which recognized only his own ideas and his own decisions as right. It led to the Fuehrer State, in which he was enthroned on a lonely height as the incarnation of this faith, unapproachable by all scruples and pretexts distrustful of all whom he suspected as potential dangers to his power, and brutal, if something crossed his ideological course.

This character picture which has been verified by the evidence, is incompatible with the assumption of the Prosecution that a partnership of interests could have existed between Hitler and the defendant. There was no partnership of interests and no common planning between Hitler and the men who were supposed to be his advisers. The hierarchy of the Fuehrer State, in association with the Fuehrer Order No. 2, which expresses the separation of work in its most flagrant form, admits only the conclusion that the so-called co-workers were only executive mouthpieces or tools of an overwhelming will but not men who translated their own will into deeds. The only question therefore, which can be raised is whether these men were guilty in that they put themselves at the disposal of such a system and that they submitted to the will for power of a man like Hitler.

This problem needs special examination, as far as soldiers are concerned; because this submitting to somebody's will, which is remote from the existence of a free man, is for the soldier the basic element of his profession: Obedienc and the duty of allegiance which exist for the soldier in all political systems.

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The legal problem of the conspiracy in the sense of the Indictment is dealt with by my colleague Dr. Stahmer and also by Dr. Jahrreiss. In the individual case of the defendant Keitel I should like only to point out two sentences of the speech as starting point of my statements:

"It is not sufficient that the plan is common to them all; they must know about it being common to all of them, and each one of them must accept voluntarily the plan as his own.

"That is why a conspiracy with a dictator at the head is a contradiction in itself. The dictator does not conspire with his followers; he does not conclude an agreement with them, but he dictates."

Dr. Stahmer haspointed out that no one acting under or on account of pressure can therefore be a conspirator. I should like to modify this for the circle to which the defendant Keitel belonged. It would not conclusively represent the real circumstances if it were said that the defendants belonging to the military branch have acted on account of or under pressure. It is correct to say that soldiers do not act voluntarily, i.e. of their own free will. They must do what they are ordered, without it mattering whether or not they approve of it. The training of will power, or in any case consideration of the training of will power, is accordingly eliminated in connection with soldiers' duties; it will always andeverywhere be eliminated because of the nature of the military profession, and it cannot appear as a determinative factor in the genesis and execution of orders, if the absolute Fuehrer principle is not in force in the Wehrmacht. The question, therefore, is this military sphere is not one of an abstract and with it theoretical deduction, but of a compelling conclusion resulting from the nature and from the practice of the military profession, when I say:

The activity of the defendant Keitel was founded on the basis of military orders. The activity of the defendant Keitel concerning the genesis of orders, decrees and other measures of Hitler, even in so far as they are criminal, cannot therefore be considered aspartnership work, i.e. as the result of a common planning within the meaning of conspiracy. Keitel's activity concerning the execution of orders consists in the due transmission of orders in the Operations Sector and in the due carrying out of orders in the administration of the war,

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i.e. the so-called Administrative Sector.

These activities however could be juridically qualified; the Prosecution has, as I think, so far submitted nothing which could possibly refute this consideration.

This is the principle of any soldier and is adopted in every place where the system of orders holds good. The significance of this assertion is particularly important in the case of the defendant Keitel. It would be possible to oppose such a presentation of evidence by considering that Keitel did not act as a soldier or in any case as soldier only and that therefore he cannot be considered responsible for the consequences of what is merely a system of orders. The unfortunate structure of his position and the manifold tasks of a chief of the OKW, sometimes even not systematically conceivable, dim the recognition of the primary conceptions regarding the defendant Keitel, namely that whatever he, Keitel, did, with which authority or organization he dealt or was in contact with, he always acted as a soldier, and it was always the general or particular order of Hitler, which placed him in the foreground and sent him into action. The facts of conspiracy seem to me comprehensibly and logically incompatible with the tasks of a soldier and with Keitel's position as head of the OKW.

In all the cases where the statements of the Prosecution have claimed conspiracy to be prejudice, the purpose of this conspiracy is an activity, performed by members of a gang departing from their normal and private activity. The result of this is - on the contrary - that any activity practised by somebody on the strength of his vocation or employment cannot be called conspiracy. In the case of a soldier it may be added that he does not act on his own initiative but in accordance with orders. A soldier might therefore well take part in a conspiracy, directed against the duties he has undertaken as a soldier, but never can his activity within the framework of his military functions be designated as a conspiracy.

The conduct of the war in the East affected relatively little the OKW, the WFST included. When I say the OKW i mean the Staff OKW. It is well known that Hitler as OKW, i.e. Supreme Chief of the Armed Forces, dealt himself with all matters concerning the conduct of this ideological war of his own and interfered

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in it. The army led, but Hitler was in steady and close collaboration with the Supreme chief of the Army and with its Chief of the General Staff, until December 1941 when, after having taken over the supreme command of the Army he also took over the direct leadership.

This personal union of a German High Commander of the Armed Forces and Commander in Chief of the Army evidently led to many mistakes which resulted in the severe charges against the German High Command, as Staff of the General High Command and its Chief of Staff General Keitel.

Keitel himself feels heavily enough the guilt of the whole complex of the war against Russia which he has frakly stated in the witness box. It is therefore not only understandable but also the duty of the defense to clarify Keitel's responsibility for all these facts of the most terrible atrocities and incredible degeneration.

For the purpose of an easier understanding of these matters, which are often most complicated, I handed the affidavit of defendant Keitel to the Tribunal. It is Exhibit No. K 10. I refer to it without reading its contents.

It seems to me of importance to emphasize that from the very beginning the war against the Soviet-Union hasbeen subject to three factors for its execution:

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First, military operations and orders: Commander in Chief of the Army, OKH.

Second, economically, the Four Year Plan.

Third, ideologically, the SS organizations.

The German High Command had no competent influence upon these three factors and no authoritative power. Neither can it be contested that in the course of his aforementioned truly anarchistic methods of work, Hitler, when all is said and done, held all the strings in his hands and sometimes used the German High Command for the forwarding of his, Hitler's orders nor it qualified to change the principal responsibility.

Considering the wide extent of the material produced by the Soviet Prosecution, I can refer, within the compass of my statement, only to a comparatively small number of the documents. The documents on pages 126 up to 136, which have been dealt with in detail, will be summarized by me as follows, briefly.

To begin with, I will discuss the documents USSR 90, 386, 364, 366, 106 and 407, and I shall try to prove in detail that the accusations against the OKW and Keitel as the guilty parties have no value as evidence as far as these documents are concerned.

Then, on page 130, I come to a category of documents to which I have referred earlier in Part 2 of my presentation, in which I dealt with official documents. If I refer to official reports of the Investigation Commission in this connection, it is not done because of their actual contents but because they have been produced as support for the indictment of Keitel. They, on the strength of their own statements, furnish the proof that Keitel's indictment and that of the OKW and the State are not based on facts as far as these serious things are concerned.

From the large number of documents in this connection I have dealt with USSR 9, 35 and 38. In these official reports, which implicate the Supreme Command of the Armed Forces, any concrete facts are lacking which might refer to the staff of the OKW--that is, Keitel--as the perpetrator or initiator of these atrocities.

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As to the actual contents or statements of the documents, I am merely pointing out that Keitel, in his position, had neither the authority nor the possibility to give orders which led to the crimes asserted.

Then, on page 134, paragraph1:

In the documents previously quoted, either Keitel or the OKW are named as the responsibility party. However, there are many such official reports which have been quoted during the presentation of the prosecution as evidence for Keitel's guilt, in which neither the name of the defendant nor the OKW is even mentioned.

In this connection, I draw your attention to documents USSR 39, 8, 29, 45, 46 and 63.

I only ask the Tribunal to examine the remaining documents equally carefully to that effect and to ascertain whether, if they are submitted in connection with Keitel and the OKW, they allow any final conclusion regarding Keitel's guilt or whether that is not the case in the documents which have been presented.

In this connection I should like to add that the remarks at the bottom of page 134 will not be read by me, and that I am not referring to them either.

I should now like to come to the statements regarding the economic exploitation of the occupied territories, and I should like to submit them--they begin at page 137--without reading them. Since the defense counsel of Reichsmarshal Goering has already dealt with this problem and has made clear the authority and responsibility, it would merely be repetition, which I shall certainly avoid. However, I shall refer to the contents of this part of my presentation and beg the Tribunal to take judicial notice of it.

I now come to pages 143 and following, where I refer to the assertion made by the French prosecution regarding the participation of the OKW and Keitel in the cases of Oradour and Tulle.

The French prosecution have charged the defendant Keitel personally with war crimes and crimes against humanity. The accusation concerns putting to death French civilians without judicial decision.

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In this connection the cases of Oradour and Tulle were particularly emphasized. They are recorded in a report by the French Government-document F-236. The French prosecution declared--and I quote: "Keitel's guilt in all these things is undoubted."

In this connection, it is not my task to discuss the frightful happenings of Oradour and Tulle. As defense counsel for defendant Keitel, I have to examine whether the assertion of the prosecution that defendant Keitel bears any guilt or responsibility in these atrocious occurrences is founded.

You will understand that the defendant Keitel is particularly intent on producing evidence to the effect that he is not responsible for these terrible occurences, and furthermore, that when such things came to his knowledge he was anxious to have them cleared up in order that the actual offenders might be brought to account.

It is incontestable that Keitel had no direct participation in these crimes. Any responsibility and guilt of the defendant can therefore be derived only from his official position. No orders of any kind bearing Keitel's signature have been submitted by the prosecution, so that whoever is guilty, Keitel does not, at any rate, belong to the circle of those directly responsible.

The horrible wrongs suffered by a large number of French villages are recorded in the notes of General Berard dated 6 July and 3 August, 1944. I have already pointed out, when this document was submitted, that by the submission of these notes of complaint alone--that is, without simultaneous production of the replies, which are also in the possession of the prosecution--no objective picture can be presented of the facts as they are for a pronouncement on the guilt of the defendant Keitel. As the defendant Keitel, owing to his lack of authority to issue orders in the matter, cannot possibly be taken into consideration as the author of the orders which led to the complaint, any responsibility and guilt of Keitel's can therefore be proved only by the fact that he did not cause the necessary steps to be taken after being informed by the German Armistice Commission. Whatever Keitel did or failed to do can be

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gathered only from the reply notes and from the stipulations of the OKW to the German Armistice Commission.

I shall skip the following sentence.

Counter-evidence would indeed be impossible for the defendant Keitel even in this case, had not the French prosecution themselves submitted a document which was to serve as proof of Keitel's individual guilt. This document is worded as follows, and was read by the French prosecution at the session of 31 January 1946.

I pass on to page 147, and there I say:

This document signed by Keitel, shows:

1. Upon receipt of the French memorandum of complaint of 26 September, 1944, the OKW issued orders to the German Armistice Commission to investigate and handle this matter.

2. Thereupon the German Armistice Commission instructed Commander-in-Chief West to investigate the incidents.

3. Upon receipt of a letter from Army Group B, the OKW expressed itself as follows:

"It was in the German interest to answer these charges at the earliest possible moment.

"The manner in which this case was handled indicates that perhaps there still exists a great deal of ignorance as to the importance to be attached to all reproaches against the German Wehrmacht, to counteract any enemy propaganda, and to refute immediately any purported German acts of atrocity. The German Armistice Commission is hereby instructed to continue giving this matter attention with all possible emphasis. It is requested to render any assistance possible and especially to take all steps for expeditious handling of the matter as far as it regards your own sphere of action. The fact that PZ, AOK 6 no longer forms part of the forces of Colonel West is no reason to prevent continuation of the needed investigation so as to bring light into and refute the French charges."

It may therefore be safe to say that it has been proved that the defendant Keitel, upon receipt of information, undertook with

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due energy such steps as were within the scope of his authority and ability as the chief of the OKW.

This eliminates the prosecution's contention in so far as it has assumed the guilt of the defendant Keitel. At the same time, however, the handling of this case by the defendant Keitel points to the conclusion that he acted in a similar manner in other cases.

Mr. President, before coming to the problem of hostages, which I thought I would leave for a later time, possibly, I was going to come to the serious evidence concerning Nacht und Nebel, which is at page 154.

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It may be said that there is hardly any order in which, during the proceedings of this Tribunal made a deeper impression on people's minds than the order "Nacht und Nebel". By this is meant an order which originated during the fight waged against acts of sabotage and the Resistance Movement in France. As a result of the departure of the troops in connection with the march against the Soviet Union, plots against the security of the German troops remaining in France, especially acts of sabotage against all means of communication increased from day to day. From this resulted the need for increased activity of counter-espionage offices, which led to proceedings and verdicts of military courts against members of the Resistance Movement and its accomplices. These sentences were very severe. In addition to capital punishment, imprisonment also. During meetings for discussion of the situation, reports which arrived daily caused violent disputes with Hitler, who, as always, was trying to find someone on whom to fix the blame, and who, according to Hitler was in this instance to be found in the far too cumbersome handling of military justice. True to his spontaneously explosive temperament, he ordered the working out of directives to create a quick effective and lasting spirit of intimidation. He declared that confinment could not be considered an effective means of intimidation. When Keitel objected that not everyone could possibly be sentenced to death, and that Military Courts would, furthermore, refuse to comply, he replied that he didn't mind about that. Cases where the offense has been established to be so serious as to impose capital punishment without lengthy Court proceedings, should continue to be dealt with as heretofore; that in other cases, however, where this was not the case, he ordered the suspected persons to be brought secretly to Germany while withholding all news as to what had happened to them, it being a fact that promulgation of sentences for penal servitude in occupied territory failed to have an intimidating effect in

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view of the armesty at the end of the war.

Thereupon the defendant Keitel proceeded to consult with the chief of the Judge Advocate's Office of the Wehrmacht and with the chief of the Foreign Counter-Intelligence Office (Canaris), from whom also came the letter of 2 February 1942 (document UK 35), deliberations as to what should be done. When repeated remonstrances with Hitler to refrain from this system, or at least to relax the demand for complete secrecy failed to have any effect, a draft was finally submitted which became the Decree of 7 December 1941 (UK-35), which we have before us here.

The staff of experts and the defendant Keitel had succeeded in establishing the competency of the Reich Administration of Justice for the persons removed to Germany (see last paragraph of directives of 7 December 1941). Keitel had guaranteed this stipulation by means of the first Enactment-Decree governing the directives, in that he made the clarifying statement (last sentence in paragraph 1, of IV) that unless otherwise ordered by OKW, the case would be referred to civilian judicial authorities according to section 3, paragraph 2, second sentence. The defendant believed that in such manner he had at least ensured that the person involved would have the benefit of regular court proceedings and that according to German provisions for accomodating and treating prisoners upon trial and prisoners serving a sentence, there could be no danger to life and limb. Keitel and his staff of experts believed that they could find comfort in the fact that however cruel the suffering, and the uncertainty endured by those concerned might be, nevertheless, the life of the deported persons had at least been saved.

Inthis connection, allusion is also made to the version of the cover letter of 12 December 1941. As already stated by the co-defendant General Jodl during his examination, there had been adopted a certain wordking when the signatory wished to express his dissent with the order submitted. The cover letter

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begins with the words:

"It is the well considered desire of the Fuehrer...."

The closing sentence runs:

"The attached directives....comply with the Fuehrer's interpretation".

Persons who received such letters knew from that wording that once again this was an order of the Fuehrer which could not be evaded, and they concluded therefrom that this order should be applied as mildly as possible.

The letter of 2 February 1942, comes from Foreign Counter-Espionage Office III (Amt Ausland/Abwehr), the original of which must have been signed by Canris. At that time the defendant was not in Berlin where, after promulgation of the decree of 7 December 1941, the matter was dealt with further. Keitel, at the Fuehrer Headquarters, was not informed of the contents of the letter. In the light of the above remarks, the wording of the letter justified the assumption that a milder carrying out would be made possible through the provision that Counter-Espionage Offices were directed "to see to it that before an arrest is made, evidence will be at hand fully sufficient to warrant the transfer of the perpetrator". It was also provided that before the arrest took place the competent military court must be approached in order to establish whether the evidence were adequate.

In Germany the transfer was to be made to the Reich Administration of Justice. Sufficient prrof for the correctness of the assumption of the defendant Keitel is found in the fact that in view of the attitude of this Admiral which is sufficiently known to the Tribunal, Canaris would never have ordered the transfer to the Gestapo.

As already stated, the defendant Keitel did not know of the letter of 2 February 1942.

Although the defendant Keitel believed that he had achieved everything possible to safeguard those involved, the "Nacht und Nebel" decree - as it came to be termed later - caused him

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great mental anguish. Keitel does not deny that this decree is not compatible with International Law, and this was known to him.

What Keitel denies, however, is that he knew, or that prior to the Nunrberg trial he knew, that after arrival in the Reich the persons involved were imprisoned by the police and then transferred to concentration camps. This was contrary to the meaning and purpose of that decree. The defendant Keitel could not learn anything about it because after the persons involved were turned over by the competent Law,Lords of the Military Courts to the competent judicial authority for transfer to Germany - to be turned over to the Administration of Justice - the competency of the Wehrmacht ceased, unless the case involved proceedings by a Military Court. The defendant Keitel is unable to explain from personal information how it happened that such a great number of persons were brought into concentration camps to experience a treatment described as "NN" such as was described by witnesses who appeared here. Results obtained through evidence presented to this Tribunal lead to the assumption that without so informing military authorities, police authorities indicated as "NN" prisoners all politically suspicious persons who on the basis of political measures were removed from occupied territories to Germany, to be placed in concentration camps. According to evidence, persons held in "NN" camps were primarily people who had not been sentenced, after formal proceedings by Military Courts in occupied territories, to be brought to Germany.

It therefore becomes evident that the police authorities in occupied territories made use of this decree as a general and unrestricted charter for deportation, exceeding every imaginable measure and regardless of the prerogatives of the Military Authorities alone, and the rules of procedure imposed upon them.

The fact that such a situation was at all possible in occupied territories without the knowledge of the Wehrmacht authorities can only be explained by the fact that as a result of the appointment of Senior SS and police chiefs, the carrying out of police duties

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was withdrawn from the military authorities, and that these higher SS and police chiefs received their orders from the Reich leader SS.

At no time were the Reich leader SS and Senior SS and police chiefs given the right by OKW to make use of the decree, intended to be used as a police executive measure by the Wehrmacht alone. The decree was valid only for the offices of the Wehrmacht in whom judicial authority had been vested, and its wording was explicit and restricted along that line.

The letter of the German Armistice Commission of 10 August 1944 (document 843 PS) proves that OKW had indeed no knowledge of this improper application of the decree of 7 December 1941. It says therein:

"...that the basis for arrests seems to have undergone a change in that, in the beginning, individual incidents and violations of law or attacks on the Occupation Power were involved; in other words it meant the apprehension of elements who had been definitely active in certain cases (and who were liable to punishment according to the Hague Convention (Hague LKO) while, at present, there are also numerous persons being deported to Germany who, because of their anti-German sentiments, are being removed from France as a precautionary measure".

Under Figure 4, that letter reads as follows:

"A prerequisite for application of the above-mentioned decree is that the persons arrested will be made the subject of judicial proceedings. There seems to be reason for assuming that because of the number of cases, especially within the compassof precautionary measures - such proceedings are now frequently being dispensed with, and the prisoners are no longer held confined in investigation or penal institutions of the German legal authorities, but in concentration camps. Also in that respect, an essential change has taken place as compared with the original provisions of the decree".

In the reply of OKW dated 2 September 1944 - signed by Dr. Lehmann, (chief of the OKW Judicial Department), explicit ref-

ence is made to the directives for the Fuehrer decree of 7 December 1941, the so-called BB decree. In it nothing is said that the original presuppositions for deportation to Germany were changed.

This reply, however, was sent from Berlin, without the knowledge of the defendant Keitel; the letter also of the Armistice Commission was evidently sent to Berlin. The legal department of the armed forces was in Berlin. Keitel himself was at the Fuehrer Headquarters, and learnt nothing of the exchange of correspondence.

It should be pointed out that it was a grave sin of omission not to have immediately replied to the letter of the German Armistice Commission of 10 August 1944, and to explain that this was a case of improper application of the decree of 7 December 1941, and the directives issued relative thereto. An investigation should have been initiated at once, so as to take to task those reponsible for this abuse.

In so far as the Tribunal regards Hitler's military staff as guilty, the defendant Keitel takes the responsibility within the extent of his responsibility as chief of the OKW.

THE PRESIDENT: Perhaps this will be a convenient time to take a recess.

(A recess was taken).

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Mr, President; The defendant KEITEL is accused by the prosecution of having participated in the deportations for the purpose of labor commitment. In this connection, KEITEL declares, that in conformity with his jurisdiction he did not have anything to do with the procurement, recruitin and conscription of people in the occupied territories, nor with the assignment of the labor forces thus procured, for the armament industry. Co-defendant SAUCKEL gave the following testimony as a witness on 29 May 1946 (Page 10484 of German Transcript):

Mr, President, the following statements I should like to have official notice taekn of without reading them. My colleague, Dr. Servatius, according to our agreement, will explain the connection between the Wehrmacht replacement and economy of manpower. However, I have to refer to some documents which the French Prosecution has submitted against the OKW and Keitel concerning active participation in deportation.

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Now the French prosecution during the cross-examination of SAUCKEL, has submitted four documents tending to prove the active participation of the OKW and of the defendant KEITEL in the deportations. These are documents 1292 PS, 3819 PS, 814 PS and 824 PS.

The first document is a report of the chief of the Reich Chancellery Dr. LAMMERS regarding a conference with HITLER, during which the question of procurement of labor for 1944 was discussed. The defendant KEITEL took part in this discussion. Annexed to this report a letter from the defendant SAUCKEL of 5 January 1944.is reproduced in which the latter summed up the results of the conference of January 4th and proposed a decree of the Fuehrer. I quote the following parts therefrom.

.....

5. The Fuehrer pointed out that it was necessary to persuade all the German offices in the occupied territories and in the allied countries of the necessity of taking in foreign labor, in order to be able to support unanimously the General Plenipotentiary for labor commitment in carrying out the required organization, propaganda and police measures.

.....

2. The penaltimate paragraph:

The following offices should in my opinion receive the decree in the first place.....

3. The Chief of the OKW, General Field Marshal KEITEL for instructions to

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the military commanders in France and Belgium, to the military commander South-East, the plenipotentiary General accredited to the Fascist Republican Government of Italy, the chiefs of the Army Groups East.

....

The document therefore proves:

a) that Field Marshal KEITEL took part in a conference, without however stating his point of view on the problem of labor procurement,

b) that the Fuehrer decree was to be brought to the knowledge of Field Marshal KEITEL for the purpose of instructing the military commanders.

And that part confirms what is concerned in that part I have not read. What defendant KEITEL admitted as to his points of contact with this question is thereby confirmed.

The 2nd and 3rd documents refer to a conference in the Reich Chancellery on July 11th, 1944, in which Field Marshal KEITEL took no part.

Now the French Prosecutor has made the statement that the teletype is an order of Field Marshal KEITEL to the military commanders to carry out the decisions of the conference of July 11th. Mr. HERZOG has said in this connection that KEITEL's order was dated July 15th, 1944. A brief examination of the document - a photostat - shows that the document concerned is a teletype of July 9th containing an invitation from the chief of the Reich Chancellery Dr. LAMMERS to a conference on July 11th, which KEITEL transmits to the military commanders. Therefore that is an error. The conclusions of the Prosecution, based on this document, are therefore also invalid, but the document is also interesting from another point of view: It states therein verbatim:

"The following directives are for the instruction of the military commanders or their representatives:

I refer to my directives for the collaboration of the Wehrmacht in the procurement of labor from France- signed teletype "Keitel"

The defendant KEITEL requested me to call the attention of the Court to this method of expression for the following reasons. Numerous documents bearing the signature "Keitel" have been submitted here. According to KEITEL's attitude, already explained, which excluded any show of authority, he never used the "I" form in his communications or transmission of orders. The Prosecution only submitted one other teletype of the defendant, apart from this document, in which the "I" form occurs. Considering the many documents

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which confirm this admission of KEITEL, this statement that here the transmission of an order of the Fuehrer was in question must be believed, also that the style of wording which I quoted corresponds to an order from the Fuehrer.

General WARLIMONT (Doc.3819 PS) refers, during the conference of 11 July, expressly to a "recently issued Fuehrer order", the contents of which he reproduces exactly as contained in the teleype directive with the signature "KEITEL".

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Important as confirming this evidence of the defendant KEITEL is likewise the newly submitted document 824-PS - RF 1515. This is a letter of July 25, 1944, from the Commander -in-chief West (von RUNDSTEDT), who in the menatime had become the Chief of the military commanders in France and Belgium. It is said therein that:

"by order of the Fuehrer the demands of the G.B.A. and of SPEER are to be fulfilled",

further that in theevent of evacuation of the battle area, measures must be taken toward securing fugitives, etc. for labor; finally that reports must be sent to the OKW regarding themeasures taken. The reference to the Fuehrer's order shortly after July 11, 1944, shows as well as WARLIMONT's statement, that there existed no directives from Keitel or the OKW.

It can be therefore considered as proved that neither KEITEL himself nor the OKW had any part in measures to levy or recruit labor. The OKW was the office in charge of transmitting the orders which HITLER, as the superior of SAUCKEL wished to forward to the military commanders; it had no competence and no legal responsibility.

It is not the same in this complex as in the spheres that are within the administrative competence of the OKW, as there existed in this sphere at least a specialized function which included the possibility of voicing doubts.

In the sphere of labor procurement and labor commitment, the points of contact with SAUCKEL's activities are the following:

a KEITEL was co-signatory of the Fuehrer's decree of March 21, 1942, concerning the appointment of the G.B.A.

b. He transmitted HITLER's orders to support theactivities of the G.B.A. on the basisof special instructions to the local military authorities of the occupied territories.

Now, at the session of 2 February 1946 the French Prosecution has, in the matter of the deportation of the Jews within the scope of defendant KEITEL's responsibility, stated the following:

> "I shall subsequently speak about the order for the deportation of the Jews and I shall prove that this order came from a joint action of the military government, the diplomatic authorities,

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and the security police in the case of France. It results from this that

1) The Commander-in-Chief and

2) the Reich Foreign Minister and

3) the Chief of the Security Police and Reich Security Head Office (RSHA).

these three persons, were bound to be informed of and bound to have agreed to this action, for it is clear that by their function they must have known that similar measures, which concerned important affairs were taken and also that the decisions were taken jointly every time by the staffs of three different administrations.

These three persons are therefore responsibile and guilty ...."

If you examine the very thorough individual handling of this item indictment you will establish that the OKW is not mentioned and that no document is produced which originates either from the OKW or from the defendant KEITEL. It follows from the KEITEL affidavit, Document Book 2, that the military commander for France, who is mentioned several times, was not placed under the OKW.

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Now, the prosecution has, in the handling of this question, attempted to prove the cooperation of the "Army", as Mr. JAURE says, with the Foreign Office and the Police. They believe they can put this cooperation to the account of the highest authorities, that is, the OKW, in the case of the Army, and therefore KEITEL. This production of evidence is erroneous. In order to make that clear, I must point out that there was a military commander in France. This military commander was invested with civil and military power; he represented a non-existant state power and therefore had police and political functions besides military tasks. The military commanders were appointed by the OKH and received their orders from the latter. As it follows from this, there existed no direct relations with the OKW on this question. Since defendant KEITEL, as chief of the OKW was not placed above the OKW, there exist likewise no indirect relations of either subordination or authority.

What Mr. FAURE has said at this point is unfortunately true:

> "In France, a plurality of jurisdictions manifested themselves with mutually divergent and even contradictory tendencies which overlapped each other or went counter to their own authority."

Actually, the OKW and defendant KEITEL had nothing to do with the Jewish question in France, with the deportation to Auschwitz and other camps; they had neither commanding nor controlling authority and therefore no responsibility.

The fact that the letter K in the telegram, dated 13 May 1942 was completed to mean KEITEL is indicative of the contention adopted by all prosecuting parties, concerning the presumptive implication of the defendant KEITEL. That was Document 1215 F. Fortunately, the French prosecutor has corrected this and cleared up the error.

The Prisoner of War Question.

The fate of prisoners of war has always stirred the feelings of men.

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It has been the endeavour of all civilized nations to give the soldiers who fell in the hands of the enemy those reliefs which could be made compatible with the interests of warfare. It has been considered as one of the most important advances of civilization to have achieved an agreement in that case in which the nations were opposed in a mortal clash. The distressing incertitude over the fate of these soldiers seemed to be bridged over, their humane treatment guaranteed, the dignity of the disarmed opponent assured.

Like so many things, our belief in this advance of human society has begun to waver. Although this belief is still formally upheld - as it has been once and for all by the solid resistance of the general officers - , we must nevertheless admit that a brutal policy, oblivious to the Nation's own sons and of anything but its own striving for power has in many cases disregarded the sanctity of the Red Cross and the unwritten laws of humanity.

The treatment of the responsibility of the defendant Keitel in the general complex of the prisoners of war system comprises the following individual problems:

1) The general adjustment of the treatment of prisoners of war, the German legislation on the prisoners of war system;

2) The authority over the prisoner of war camps, divided into Oflag, Stalag and Dulag;

3) The supervision and control of the legislation and its administration.

4) The individual cases which have been brought before the court in the course of the indictment.

As the organization of the prisoner of war system has been set forth in the course of presentation of argument, I can restrict myself to setting forth that the OKW (Keitel), within the scope of his tasks as War Minister, in accordance with the decree of 4 February 1938 by order of Hitler, was competent and to that extent responsible:

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a) for the ministerial right to issue ordinances within the entire local and professional range, partially restricted by co-work and co-responsibility in the matter of using the prisoners of war as laborers;

b) not authorized to have command over prisoner of war camps and the prisoners of war themselves, competent to allocate on a large scale to the Corps Area Commanders the prisoners of war arriving within Germany proper;

c) for the general supervision of the camps within the range of the OKW (except for those within the range of the zone of operations the rear-army area, the area of the military commanders, the Navy and Luftwaffe prisoner of war camps).

The competent office for this in the Army High Command was the "Chief of the prisoner of war system", who was several times made personally responsible by the prosecution. The defendant Keitel attaches importance to the fact that the Chief of the prisoner of war system was his subordinate over the general Wehrmacht office. This proves the self-evident responsibility of the defendant Keitel in this domain even in those cases in which he supposedly did not sign orders and decrees personally.

The basic provisions for the treatment of prisoners of war were

1) The service regulations issued by the Chief of the Wehrmacht High Command within the scope of the normal mobilization preparation and set down in a number of Army, Navy and Luftwaffe publications.

2) The stipulations of the Geneva Convention special mention of which was made in the service regulations.

3) The general decrees and orders which became currently necessary.

Regardless of the treatment of Soviet-Russian prisoners of war, who were subject to regulations which were different on principle and to which I shall return in particular, the provisions of the service regulations which corresponded to international law, that is the Geneva Convention, were authoritative. The OKW exercised supervision over the strict observance of these Army service regulations through an inspector for the prisoner of war system and after

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1943 through a further inspectory board, the inspector-general for the prisoner of war system."

As further inspectory bodies may be counted the representative of the protecting powers and the International Red Cross, which no doubt submitted to the various governments reports on the results of their inspections of and visits to the camps - in accordance wit the provisions of the Geneva Convention. No such reports have bee submitted here by the prosecution; I shall come back to the charge brought in by the French prosecutor. The fact, however, that the British and the American Prosecutions, for example, have not submitted such reports may well permit the conclusion that the protecting powers did not determine serious violations with regard to the treatment of the prisoners of war in camps.

The treatment of prisoners of war, which during the first few years of the war did not lead to complaints of a serious nature with the western powers--I except individual cases like the Dieppe case--became increasingly difficult for the OKW from year to year, because political and economic considerations gained the strongest influence in this sector. The Reichsfuehrer-SS tried to get the prisoner of war system into his hands. The struggles for power which were caused by this from October 1944 on had the result that Hitler turned over the prisoner of war system to him ostensibly because the Wehrmacht had shown itself too weak, and that it had let itself be influenced by considerations based on international law.

Another important factor was the constantly increasing influence caused by a rising labor shortage, which was exercised by the Movilization of Labor and the armament sector on Hitler and which was exercised over him on the OKW.

The Party-Chancellery, the German Labor Front and the Ministry of Propaganda Likewise, were included in this actually purely military question. The OKW was engaged in a constant struggle with all these agencies, which for the most part had more influence on Hitler than the OKW.

All these circumstances must be taken into consideration, if one wishes to understand and value the involvement of the defendant

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Keitel correctly. Since he personally had to carry out the functions "by order of" since Hitler always kept the problem of the prisoner of war system under his personal control because of the previously described reasons, the defendant Keitel was almost neve in a position to voice his own, that is military misgivings against instructions and orders.

The treatment of French Prisoners of War.

As the result of the agreement of Montoire, the key word for the French prisoners of war was "collaboration". Their treatment moved in the direction outlined by it, which through discussions with Ambassador Scapini led to considerable improvements for them. In this connection I refer to the answers to the questionnaire given by Ambassador Scapini, who states amongst other things:

"It is correct, that General Reinecke examined the questions at hand objectively and without hostility, and that he attempted to regulate them understandingly, when they depended on his authority alone. He maintained a different attitude when the pressure exercised on the OKW by the Labor Service and sometimes by the Party made itself felt."

The prisoners of war used for labor were scarcely guarded. French prisoners of war used in the country had almost complete freedom of movement. By virtue of the direct understanding with the Vichy--government, considerable mitigations existed to the rul of the Geneva Convention, after their repatriation by virtue of the armistice-provisions had very considerably lowered the number of the original prisoners of war.

THE PRESIDENT: Dr. Nelte, is there anything very important in these next few pages, until you get to Page 183?

DR. NELTE: It is the treatment of the French --

THE PRESIDENT: If you would only deal with it in a very general way. I should have thought there was nothing very importa until you get to Page 183 where you begin to deal with the accusation in reference to the Sagan case. You see, it is 12:00 o'clock now.

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DR. NELTE: I believe that by 1:00 o'clock I shall be through. May I understand your remark to mean that you would like me to limit my speaking time to one hour?

THE PRESIDENT : That is what the Tribunal's order was.

DR. NELTE : I submitted my request to the Tribunal, and since it was not directly rejected, I believed I could assume that in this particular case my request was granted, but if that is not the case --

THE PRESIDENT : Well, the Tribunal will give you until 12:30 on account of any interruptions which I may have made. I again suggest to you that there is really nothing between 178 and 183 which is of any truthful importance.

DR. NELTE : I hope, Mr. President, that that does not mean that these statements are irrelevant.

THE PRESIDENT : I said "of truthful importance."

DR. NELTE : Yes. I should not like to omit the case which was mentioned repeatedly in the course of the evidence, the case of the 50 air force officers the Sagan case.

It touches us Germans to a particular extent, because the unrestrained and boundless ruthlessness of the orders and of the character of Hitler, who did not for a single instant let himself be influenced in his explosive decisions by the thought of the German Wehrmacht's honor, is shown here.

The cross-examination of the defendant Keitel by the representative of the British prosecution has clarified in how far his name has become implicated in this shocking state of affairs. Although it has been clearly established by evidence that Keitel has neither heard nor transmitted Hitler's murderous order, or that he and the Wehrmacht are not associated with the execution of this order, finally that he opposed by all means in his power the transfer of the escaped officers to Himmler, and at least obtained that the officers who had been taken back to the camp were saved, he has, however, the distressing feeling of consciousness of guilt, not to have recognized at that time what a terrible blow German military prestige was bound to suffer throughout the world by such a measure.

In connection with the treatment of the Sagan case the French Prosecution laid before the defendant Keitel document 1650-PS which deals with the treatment of escaped prisoners of war.

This, Mr. President, deals with the so-called "Bullet Order". Considering the lack of time, I should like to shorten this case, but I have to deal with it because it is one of the most significant accusations against my client, and I shall only summarize.

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During his examination, Keitel made the following statement :

"This document 1650-PS, opens like a document which has been seized at a police station, with the words "The OKW has decreed the following."

Keitel says :

"I have certainly neither signed this order of the OKW nor seen it; there can be no doubt about that. I cannot explain it; I can only state a presumption as to how this order came about."

Then he mentions in his examination the various possibilities as to how such an order could have come to the office which issued the order. Then he refers to another document, 1544-PS, a document which contains all the orders and directives concerning escaped prisoners of war, but not that one order referring to the escaped officers and non-commissioned officers in question.

On page 186 a, I continue.

The witness Westhoff confirmed that the concept "Stufe Roman III" and its meaning were unknown to him and to the office of the Supreme Command of the Armed Forces Prisoner of War Affairs. He also stated that on entering office on 1 April 1944 he did not find an order of this nature, and thus no file notice.

It was absolutely unclear what was meant by that Bullet Decree. I believe evidence presented here has cleared that up, evidence by co-defendant Kaltenbrunner, who on his part had never spoken to the defendant Keitel about that matter.

On page 187 we find that Kaltenbrunner said, "I had not heard of the Bullet Decree. It was an entirely new concept for me." Therefore, I asked what it meant. He answered that it was a Fuehrer Order; he did not know any more. I was not satisfied with this information, and on the same day I sent a teletype message to Himmler asking him to please permit my reading an order of the Fuehrer which was called "Bullet Decree". A few days later, Mueller came to see me by order of Himmler and submitted to me a decree which, howeve did not originate from Hitler but from Himmler, and in which Himmler stated that he was passing on to me a verbal Fuehrer Order."

From this it is safe to assume that without speaking to Keitel and without the latter's knowledge, Hitler must really have given such an order to Himmler as it is stated in Document 1650-PS which was submitted here.

Now I come to page 190, my own conclusion.

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For the subjective judgment of the facts of the implied crimes the elementary importance lies in the knowledge of them, not only for the conception of guilt, but also for the Prosecution's ultimate resolution, the concurrence, the toleration as well as the omitted counter action. The knowledge of facts comprises :

1) the knowledge of the facts;

2) the perception of the establishment of a goal;

3) the perception of the methods;

4) the conception and faculty for conception of the consequences.

During discussion of the question as to how far the defendant Keitel coul have possibly drawn any conclusions from the textual knowledge of the National-Socialist Party Program and from Hitler's book "Mein Kampf" I have already stated the reasons for which Keitel had no perception of a realization by force.

As confirmed by Grand Admiral Raedel, Keitel denied the knowledge of an intended war of aggression until the war against Poland broke out. This opinion is certainly a subjective truth, because of Keitel's honest disbelief in a war with Poland, not to talk of any intervention by France and England . This perception, shared by Keitel and other high-ranking officers, was based on the fact that the military potential was too insufficient to risk a war and possibly expect a victory; the more so as it would evidently develop into a war on two fronts. This belief was also supported by the Non-Aggression Pact with the USSR of 23 August 1939.

However, that is not the core of the problem. The speeches by Hitler before the generals, beginning with the conference of 5 November 1937, in whic Keitel did not take part, permit from time to time the clearer recognition th Hitler did not wish to attain his aims so or so, that is, if not through friendly negotiation, then through war, or in any case, through employment of the Wehrmacht as an agent of pressure. There can be no doubt about that. One may argue over whether the context of the speeches of Hitler, concerning whic there are no official notes or records of minutes reproduce more or less the text of the conference correctly. But on what there can be no doubt is that they permit Hitler's point of view to be clearly recognized.

Accordingly, one must differentiate whether one could believe that a definite plan would come to its execution or whether one had to win the recognition that the general intention for aggression existed. If this recognition did not exist, then this can only be explained by the fact that the generals did not take the question war or peace into their consideration from the basic attitude assumed. According to their point of view, this was a political question, for which they did not hold themselves competent, since, as has been said here, the bases for such a resolution were not known to them and, as the defendant Keitel has testified, the generals had to have confidenc in the leadership of the State, that the latter would only undertake war for pressing reasons. This is the result of the traditional principle that the Wehrmacht is probably an instrument of politics, but may not participate in politics by itself, a principle, which was taken over by Hitler in all its severity. The court may decide whether this is to be valued as an excuse.

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Keitel explained on the witness stand that he recognized the orders, directives and instructions which had such terrible consequences, and that he drew them up and signed them, without allowing himself to be disconcerted by the possible consequences.

This testimony leaves three questions open: the question of the methods in the execution of the orders; the question of conception of the consequences which actually occurred; and the question of the dolus eventualis.

The defendant Keitel in his affidavit (Doc Book II, No.12) presented the influence of the SS Police Organizations on the conduct of the war and the involving of the Wehrmacht in the occurrences. The record of evidence has shown that numerous Wehrmacht commanders applied such terrible orders partly not at all, partly in a milder form on their own responsibility. The methods of the SS, which gave these orders their terrible effect, were strange and therefore unimaginable to the soldier Keitel, grown old in fixed concepts. According to his testimony, these effects also did not become known in their terrible extent.

The same holds true for the Fuehrer Decree "Nacht und Nebel." If he did not allow himself to be disconcerted by the "possible" results, as he forwarded these orders, the dolus eventualis in regard to the results taking place can still not be affirmed. It is much more to be assumed that if he had not been able to recognize the horrible effects, he could have accepted the consequence, in spite of the prohibition of requests for resignation, which would have freed him from the hard necessity of knowing and would not have pulled him into the whirlpool of events ever more from month to month.

There may be an hypothesis to this: the testimony, however, has furnished certain pertinent facts for the correctness of this. The five-fold attempt to leave his position and the resolve to end his life, which was witnessed by Colonel General Jodl, give you the opportunity to attribute the sincere desires of Keitel.

If he did not succeed, then this lies in the circumstances which I have already presented: the unequivocal and, as Keitel says, unconditional duty of the soldier true to his military oath, to do his duty obediently to the bitter end.

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This concept is false then, if it is accordingly so exaggerated, that it leads to crime. It must also be considered, however, that with a soldier, he is accustomed to measure by other standards in war. If all high officers, Field Marshal Paulus as well, represented the same point of view, one may thus not understand that perhaps, but no one will deny them the honesty of their convictions.

The defendant Keitel replied to the question which was put so often during this trial why he did not refuse to obey or revolt against Hitler, that these questions were not taken by him into consideration, even for an instant. According to his words and behaviour, he is an absolute soldier. Did he place the guilt on himself with this conduct?

It is entirely a general problem whether a general may or must commit high treason if he realizes that the execution of an order or of a measure violates the international law and/or the laws of humanity.

The solution of this problem presumes the reply to the previous question, which is the "authority" which "allows or orders" criminal high treason. This question appears to me of significance for the reason, because the legitimation is to be established who can allow or order the general to commit high treason, who can "bind and absolve."

As the present state power, which in this case was represented by the Chief of State, identical with the Supreme Cpmmander of the Wehrmacht, does not come into the question; the question is merely whether there is an authority which is above or outside of the individual State Authority, which could "bind or absolve."

Since the struggle for power between Pope and Emperor which dominated the Middle Ages, has no longer an actual importance in the sense of constitutional law, this power can be impersonal and moral only; the highest command of the unwritten, eternal right is put by the German poet Schiller into the words: "The power of tyranny has a limit....." It is only one of the so manifold poetical revelations of world literature, which expresses the deepest yearning for freedom by all peoples.

If there is an unwritten law which corresponds to the unquestionable conviction of all men, it is this that with due consideration for order in the state, there is a limit for the restriction of freedom. Should this be

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overstepped the state of war of national order against the international power of world conscience will result. It is important to establish that up till now there did not exist a statute of international law of this kind. It is understandable for the relativity of the conception of freedom in various states and the anxiety of all states about their sovereignty stand in incompatible opposition against the recognition of an international authority.

The authority which "binds and absolves" which absolves us of guilt before God and the people, is the universal conscience which becomes alive in every individual. He must act accordingly. The defendant Keitel did not hear the warning voice of the universal conscience. The principles of his soldierly life were so deeply rooted, governed his thinking and actions so exclusively that he was deaf against all considerations which would lead him away from the path of obedience and faithfulness, as he understood them.

This is the really tragic role which the defendant Keitel played in this most terrible drama of all times.

THE PRESIDENT: Dr. Kauffmann -- yes, go on, Dr. Kauffmann.

DR. KAUFFMANN (Counsel for defendant Kaltenbrunner): Mr. President, may I first say that I have a few changes which I will announce when I come to them. I will take about two hours altogether, Mr. President.

May it pleased the Tribunal. The present trial is world history, but world history full of revolutionary tensions. The ghosts which were called are stronger than the cry of the suffering peoples for justice and peace. Ever since deification of man and humiliation of God chaos as an inevitable consequence and punishment is afflicting mankind with wars, revolutions, famine and despair. If my country was culpable of the greatest guilt, then permanently, it does the greatest penance a people has ever done.

The means for restoring the so much longed-for prosperity are erroneous, because they are second-rate. And no one of my listeners is in a position to call me a liar, when I assert that the present trial does not begin at the end of a period of wrong, to make an end to it, but is being surrounded by the surge of the waves of a furious torrent, on the surface of which the wreckage of a civilization, guarded through the centuries, is floating hopelessly, and on whose deep demoniacal bottom the foes of the true God, of Christian religion and, therefore, of any Justice, are lurking.

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The European commonwealth of peoples, whereof my country has been the heart-piece, is seriously ill. It suffers from the spirit of negation and from the humiliation of the dignity of human nature. Rousseau would curse his own maxims if he had lived to see the radical refutation of his theories in these years of the 20th century. The peoples had announced the "liberty" of the Great Revolution, but in the course of but 150 years they have in the name of the same liberty created a monster of cruel slavery and ungodliness, which was able to escape earthly justice, but not to elude the living God.

This Tribunal, conscious of its task and its mission, will some day have to pass before the probing eye of history. I do not doubt that the selected judges are striving to serve justice as they see it. But will not this problem indeed be beyond solution? The American chief prosecutor stated that in his country important trials seldom begin before one or two years have elapsed. I do not need to throw light upon the deeper core of truth contained in this practice. Would it be possible for human beings, torn between love and hate, justice and revenge, to conduct a trial immediately after the greatest human catastrophe ever known and constantly driven by the statutory demand asking for time-saving, swift proceedings, in such a way that they are entitled to the thanks of manking at a time when the waters of this second deluge will have receded into their former bed?

Would it not have been better if the above-mentioned distance between crime and atonement would have been adhered to in the course of the present proceedings?

Law can be shaped only, when the Court possesses inner liberty and independence of such nature as to feel subject to no other considerations than to conscience and to God Himself.

Such an august activity had sunk into oblivion in my country, in the first place in the mind of the governing class of the nation; Hitler had humiliated law to the rank of a prostitute of purpose. But this Tribunal intend to furnish proof to the world that allprofit for the peoples is based on law alone. And no other thought than unselfish justice could arouse more joy and hope within the heart of people of good will.

I am not criticizing, it would serve no purpose, the provisions of the Charter, but I am asking whether any justice on earth has and indeed could

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not have been found, if Might acknowledged Reason so far as to grant the enemies a regular trial, but could not make up its mind to crown this tribute to Reason by appointing a truly international tribunal; Nineteen nations appear to have approved of the legal basis of the Charter; we do not know this, but Mr. Justice Jackson indicated it -- it is far more difficult to apply the written law.

The American chief prosecutor has emphatically declared that he did not intend to hold the entire German nation guilty, but the records of this Tribunal, which history will someday scrutinize attentively, contain nevertheless many things which, to us Germans, appear to be false and therefore, embittering. They unfortunately also contain repeatedly explicit questions of the French Prosecution; to what extent, for example, certain crimes against humanity both in and outside Germany have become known to the German people. Indeed, the French Prosecution has asked explicitly; "Could those atrocities remain, on the whole, unknown to the entire German nation, or have they come to its knowledge?" These and similar questions are not suitable for solving such a difficult and tragic problem with even the slightest regard for the truth. To the extent that evil, which always grows and manifests itself organically, gets the upper hand among a nation, to that extent every individual who has reached the age of reason bears some guilt for the catastrophes of his country. But even this guilt, lying in the sphere of metaphysics, never could become a collective guilt of a nation, unless every individual also in this nation had incurred an individual guilt. But who would be entitled to establish such an individual guilt without examining thousands of individual circumstances?

The problem, however, becomes even more difficult should one try --and this is aimed at -- to establish the so-called national guilt for any crimes actually committed against peace, humanity, etc., during the past years on the part of the omnipotent state in whatever possible form. One should bear in mind most carefully the condition of the Reich before 1933.

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This has been done sufficiently here and I do not speak about it. Hitler monopolized such deep-reaching concepts as the proverbial German diligence, homeliness, sense of family, willingness to make sacrifices, aristocracy of work and hundreds of other things. Millions believed it; millions did not. The best people did not abandon the hope, that they would be able to avert the tragedy foreboded by them. They flung themselves into the stream of events, collected the virtuous ones and fought, visibly or invisibly, against the bad ones. Can a plain, uneducated man in the street be blamed for not being ready to deny Hitler, offhand every credibility as a man who knew how to pass as a seeker of truth, and who every time showed to peacelovers the highly extolled palm of peace? After the assumption of power large sectors of the German people could feel themselves at unison with many other peoples on earth. Therefore, it is not astonishing that gradually, with the approval or the tolerance of other countries, Hitler acquired the nimbus of a man unique in the century. Only the German who lived during the past years in Germany and did not scour from abroad, as with a telescope, the German space, is finally authorized to give information concerning the historical facts of an almost impenetrable method of secrecy, the psychosis of fear and the actual impossibility of changing the regime, and herewith to comply with Ranke's demand to historians, to establish "how it came to pass".

Let me say a few words about that secrecy. This trial has shown clearly that the state itself gathered all knowledge of such facts as would discredit its prestige and knew well how to guard it. The men under indictment here, who have been called conspirators -- or most of them at least -- have been the victims of that peculiar system of secrecy.

A special place in that system of secrecy is reserved to the plan for the biological destruction of the Jewish people, which for years tried, under the designation of a "final solution" to camouflage the terrible intentions.

THE PRESIDENT: Dr. Kauffmann, it seems to the Tribunal a very long preamble to the defense of the defendant Kaltenbrunner, who has not been named at allyet in what you have said. Is it not time that you came to the

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case of the defendant whom you represent? We are not trying a charge against the German people. We are trying the charges against the defendant. That is all we are trying.

DR. KAUFMANN: Mr. President, in the next few sentences I would have concluded that, but I would like you to understand that in the core of my case there is the serious word "humanity", and I believe that I am the only one of theDefense Counsel who intends to go more deeply into that subject; and I ask that I be permitted to make these few statements. I shall come to the case Kaltenbrunner very quickly.

THE PRESIDENT: On page 8 you have a headline which is, "The Development of the History of the Intellectual Pursuit in Europe." That seems rather far from the matters which the Tribunal has got to consider.

DR. KAUFMANN: Mr. President, may I remind you this question has been discussed by the Prosecution and especially by M. de Menthe. I do not believe that I can carry out my task if I take these tremendous crimes only as facts. An opportunity must be given to give a short description -- and it is very short. After a few pages, I come back to the case of Kaltenbrunner, and my plea will be the shortest one, at any rate, which will be presented here.

THE PRESIDENT: Dr.Kaufmann, the Tribunal proposes, as far as it can, to decide the cases which it has got to decide in accordance with law and not with the sort of very general, very vague and misty philosophical doctrine with which you appear to be dealing in the first twelve pages of your speech, and, therefore, they would very much prefer that you should not read these passages. If you insist upon doing so -- there it is, but the Tribunal, as I say, do not think that they are relevant to the case of the defendant Kaltenbrunner. They would much prefer that you would begin at page 13, where you really come to the defendant's case.

DR. KAUFMANN: Mr. President, of course, it is extremely difficult for me to present a plea now which is very much condensed already and to condense it even more. It is really difficult. I hope that the Tribunal will appreciate that.

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THE PRESIDENT: Dr. Kaufmann, there has been nothing condensed in what you have read up to the present. It has been all of the most general type.

DR. KAUFMANN: May I read a few sentences then about the Defense?

THE PRESIDENT: Could you summarize the general nature of what you wish to say before you come to the defendant Kaltenbrunner?

DR. KAUFMANN: Yes, I shall try it. I will read only a few sentences in an important chapter which concerns the task of the Defense. I say that the Defense has been established by the Charter, and I deal with the question of how, in the face of such excesses, a Defense can still realize its task. I say further that in this trial, error and truth are mysteriously mixed, probably more so than they ever were in a great trial of law. To try to establish the truth makes the Defense Counsel an assistant of the Court, and justification exists for the Defense to doubt not only the credibility of the witnesses but also the documents. It justifies the Defense Counsel to state that such reports, although they may be admitted by the Charter in evidence, can only be accepted with serious objections, because none of the defendants or defendants' Counsel or neutral observers could have any information on the way they were brought about.

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These statements were made, certainly, within the framework of the law, but I believe also within the framework of power.

The people, or a large part of the people, in their aspiration for peace and happiness, elevate the representative of a terrible heresy to the position of their Fuehrer, I might say to a demigod; this Fuehrer abusing the faith of his followers in the grossest imaginable way; this people then in the bondage of a slave not being able to find the strength for a timely opeh resistance and tumbling into the hugh abyss of annihilation of its entire racial, political, spiritual and economic existence. All of this, in the truest sense of the word, is tragic. Had the individual man in the street, the mother in the home, and her sons and daughters, been asked to choose between peace or war, never voluntarily would they have drawn the lot of war. The unsatisfactory element of this trial is the absence of the man--

THE PRESIDENT: Are you now reading from some part of your document?

DR. KAUFFMANN: I am reading a few sentences, Mr. President. This is at page 7 of the German text.

THE PRESIDENT: Can't you summarize the argument you are presenting?

DR. KAUFFMANN: Mr. President, I would appreciate it if I could be told once more whether the Tribunal does not wish at all that I read the ideological background so that I may put some ligh on it for the understanding of these crimes against hunanity, crime against the peqce. If the Tribunal states that it desires that I not make any such statements at all, then of course I shall follow the wishes of the Tribunal.

THE PRESIDENT: Well, Dr. Kauffmann, if you think it is necessary for you to read this passage you may do so; but, as I have indicated to you, the Tribunal think it is very remote indeed from any question which they have to consider.

DR. KAUFFMANN: Thank you very much. Then I shall skip a few pages and shall only present, for five pages, the subject which I

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have just mentioned.

That begins with a heading and then continues:

The rise of Hitler and his downfall, unique in its extent and consequences, may be viewed, regardless from what side--

THE PRESIDENT: (Interposing): What page are you on?

DR. KAUFFMANN: It is at page 9 of my document book, and the heading is "Development of the history of intellectual pursuits in Europe."

THE PRESIDENT: Go on.

DR. KAUFFMANN: I continue: It may be viewed from the perspective of the historic spectacle of German history, or from the supposedly constrained course of economic forces, from the sociological separation of its people, from the racial character conditions of the German, or from the mistakes which the other brothers and sisters of the family of nations, living in the same house, committed in the political sphere.

All this does certainly round out the picture of the analysis but always it brings to light only partial knowledge and partial truth. The deepest and, at the same time, the most fatal reason for the phenomenon Hitler lies in the metaphysical domain.

In the final result, the second World War was unavoidable. Anyone, however, who looks at the world and its aspects only from the viewpoint of economic problems, may arrive at the belief that the war--the first as well as the second World War-- could have been avoided through a reasonable distribution of the wealth of the earth. Regarded by themselves alone, economic reasons are never able to change the face of the earth. Therefore, the change of the standards of living of the German people, their

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deterioration, the demoralization of the national soul by the Treaty of Versailles, inflation, enormous unemployment and others became rather the outward cause for Hitler. Still it is possible that catastrophes might be delayed by years or decades if certain outward living conditions make the mutual relationship of the nations and people apparently happy. At no time, however, can a wrong idea be extinguished through economic disposition alone and be deprived of its destructiveness for the individual a d for the nations, unless the people overcome and replace these ideas by spiritually better ones.

"In the manner in which the name of God is used by the people and nations," says the famous Donoso Cortes, "lies the solution of the most feared problem."

Here we have the explanation for the providential mission of the nations, of the races, for the great changes in history, for the rise and downfall of empires, for conquests and wars, for the different characteristics of the nations, yes, even for their changing fortunes.

Monsieur de Menthon has tried to analyze National Socialism intellectually. He spoke of the sin against the spirit, from which all crimes originated. He called National Socialism a coarser Darwin.

I skip a few lines here.

I wish to say here that Hitler was not a meteor, the fall of which was incalculable and unpredictable. He was the exponent of an ideology which was atheistic and materialistic, to the last degree.

There is every reason to reflect that, although National Socialism is eliminated through the complete defeat of Germany, and although the world is now free of the German threat, proclaimed by all nations, there has been no change for the better. No peace has filled our hearts, no rest has come to any corner of human existence.

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It is true, the collapse of a powerful state with all its physical and spiritual forces will send out waves for a long time, as the sea is stirred into motion when a large stone is thrown into the calm water. But what happens at present in Europe, and in the world, is much more, indeed it is something quite different from the mere ebbing away of such an occurrence.

To continue the comparison, the waves rise anew from the deep; they are fed by mysterious and constantly emerging forces. These are those restless ideas, aiming at the disaster of nations, of which I spoke. And nothing could give me the lie when I maintain that everybody, victor and vanquished, is living in the middle of a crisis which disturbes the conscience of the individual and the nations as a monstrous, apparently inevitable nightmare, and which, beyond the punishment of guilty individuals, causes us to look out for those ways and means which can spare humanity from an even greater catastrophe.

In his "Confessions of a Revolutionary", Proudhon, the clear-sighted socialist wrote the memorable words: "Every great political problem also always has within itself a theological one." He coined this phrase one hundred years ago. It is most timely that the American General MacArthur, at the signing of the Japanese surrender agreement is said to have repeated these deep words in their essential meaning, by saying: "If we do not create a better and greater system, death will be at our door. The problem is, fundamentally speaking, a religious one".

The changes in religious values determine history. They are the strongest motive powers in the cultural process of humanity. Permit me to show you in a few, rather large strokes, the intellectual and historical forebears of National Socialism.

THE PRESIDENT: Dr. Kaufmann, it is one o'clock, and I must say that the last two pages which you have read seem to me to have absolutely nothing to do with crimes against humanity or

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with any case with which we have got to deal. I suggest to you that the next pages, headed "Renaissance, Subjectivism, French Revolution, Liberalism, National Socialism" are equally completely unlikely to have any influence at all upon the minds of the Tribunal.

The Tribunal will now adjourn.

(A recess was taken until 1400 hours).

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AFTERNOON SESSION

(The Tribunal reconvened at 1400 hours)

DR. KAUFFMANN: Mr. President, I am going to leave out the section headed "Renaissance, Subjectivism, French Revolution, Liberalism, National Socialism." The contents of that can be summarized in two or three sentences, and I merely beg you to take cognizance of it. I have pointed out that the causes in all these unfortunate movements were the spiritual attitude such as that of anthrocentric humanism as described by Jacques Maritain.

I then continue on Page 13.

Is Kaltenbrunner Guilty?

In the midst of this spiritual situation in general stands thefigure of the defendant, Dr. Kaltenbrunner. The fatherland was already bleeding from a thousand wounds of its sensitive soul and of its gigantic power. Is this man guilty. He has pleaded not guilty and yet guilty. Let us see which is the truth.

As I emphasized at the beginning Kaltenbrunner, until the year 1943, was, in comparison with the other defendants at this trial, a man who was hardly known in Germany, at any rate the one who had hardly any association with either the German public or the high officials of the regime. In those days when the military, economic and political fate of the German people had begun to roll with crazy velocity towards the abyss, hate and abhorrence of the executive were at their climax, the more so, as the paralyzing sensation of the hopelessness of any resistance against the terror of the regime had disappeared; people had then definitely turned away from the legend of invincibility preached by propaganda. Suddenly, so to speak, and without the existence of any special ability nor of any application, Kaltenbrunner was drawn into the net of the greatest accomplice of the greatest murderer, from his secluded, and, nothwithstanding the Austrian Anschluss - from the viewpoint of international criminal law - untainted life. And here I add, he came from Austria. I would say born alomst on V-day, and he was drawn into this murder -- not voluntarily, on the contrary, against his repeated resistance, and against his exertions to be ordered to the fighting front.

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I can well understand that I will be answered, that I should in view of the sea of blood and tears, refrain from illuminating the phsiognomy of this man's soul and character. But deep in my heart - and I beg not to be misunderstood - I am, while exercising my profession as a counsel, even of such a man, moved by the universal thesis of the great Augustine hardly intelligible for the present godless generation: "Hate error, but love man." Love? Indeed, in so far as it should pervade justice; buecause justice without this nobility of love becomes plain revenge, which the prosecution explicitly contends to disavow. Therefore, for the sake of this justice, I am to show you that Kaltenbrunner is not the type as repeatedly described by the prosecution, namely the "little Hitler", his "confidant" the "second Heydrich."

I do not believe that he is the ice cold being as the witness, Dr. Gisevius, hasmade him out to be here in such an altogether negative manner, in fact from hearsay only. The defendant Jodl has testified before you that Kaltenbrunner did not belong to Hitler's confidants who always got togehher with him after the daily situation conferences in the Fuehrer headquarters. And the witness, Dr. Mildner, has stated on the basis of direct observation, without his testimony having been doubted by the prosecution:

"From my own observation Ican confirm: I know the defendant Kaltenbrunner personally. In his private life he was an irreproachable man. In my opinion he was promoted from Higher SS and Police Chief to Chief of the Security Police and of the SD, because Himmler after the death of his principal rival Heydrich, in June 1942, did not want any man anymore or did not tolerate anybody under him who could have endangered him in his position. The defendant Kaltenbrunner was no doubt the least dangerous man for Himmler. Kaltenbrunner was not ambitious to bring his influence to bear through special deeds and to push finally Himmler aside. He was not hungry for power. It is wrong to call him the "little Himmler."
The witnesses Eberstein, Wanek and Dr. Hottl have expressed themselves in the same manner.

And yet this man took overtheoffice of the Reichssicherheitshaputamt, the RSHA, yes, he did indeed take it over to thefullest extent.

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Today this man suffers a great deal under thecatastrophe ofhis people and under theuneasiness of his conscience; nothing is more understandable than that Dr. Kaltenbrunner, knowingly or unknowingly, can no longer face the fact that he actually was in charge of an agency under theburden of which rocks would talk if that could have been possible; personality and character of this man will have to be judged differently from the way the prosecution has been doing this.

For the psychologist the question arises how a man, let us say, with normal civil virtues, could take an office under his control, which became the very sum total of human slavery of the 20th century,, as far as Germany is concerned. There may be two reasons for taking over this office, nevertheless: One is based on the fact that Dr. Kaltenbrunner, although closely connected with the political and cultural interests of his Austrian homeland; supported National Socialism in its large scope. Because before he turned into the sidepath with his secrets, he marched with thousands and hundred of thousands of other Germans, who desired nothing else than a solution from the unstable conditions prevailing at that time, on that wide road into which theeye of the entire world had insight. Therefore, he was, without a doubt a follower of anti-semitism, however, only in the sense of the necessity for retrograding the flooding of the German race with alien elements, he condemned just as harshly the mad crimes of physical annihilation of the Jewish race, as Dr. Hoettl definitely stated.

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Kaltenbrunner surely affirmed also Hitler's personality as far as it did not, by and by become apparent in its absolutely misanthropic and thereby un-German nature. Also fundamentally he approved, as he himself admitted during his interrogation, measures which implied, more or less sever compulsion, as for example, the organization of labor education camps. Therefore, no sensible person will want to question the fact that he deemed the establishment of concentration camps quite proper, at least as provisional measure especially during the war as this had been the case for a long time on the other side of the German border. The establishment of concentration camps, or however one wishes to call those places, at mentioning of which thelistener involuntarily is reminded of words by Dante, is unfortunately not unknown to many states. History knows of them from South Africa for some decades, from Russia, England and America during this war, for the admission among others, of persons who for reasons of conscience do not want to serve with arms. In Bavaria, in the land in which the tribunal presently sits, these sort of camps are also known; known is also the so-called "automatic" arrest for certain groups of Germans. Under the heading: "Political Fundamentals" in item B-5 of the text of mutual declaration of the three leading statesmen about the Potsdam Conference of 17 July, 1945, the statement is contained that, among others, all persons who are dangerous for the occupation orits aims shall be arrested or interned.

The necessity of camps of this sort is thereby recognized. I myself hate the organization of human slavery, but I state openly, that these institutions lie on the way which when followed to the end can and will bring suffering to persons of a different opinion, then desired by the state. By this the crimes in the German concentration camps shall not in the least be diminished. As far as Kaltenbrunner is concerned this man, according to my conviction and as can be affirmed by many witnesses, is in his character and his attitude, apparent since 1943, basically a national socialistic leading personality, who only with disgust took notice of the general trend, of the continually growing wave of terror and enslavement in Germany.

For this reason I deem it important to point to the statement of the witness Eigruber, according to which the statement of the prosecution is

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wrong, that Kaltenbrunner established Mauthausen.

The second motive lies in the subject of the two conversations with Himmler, about which he testified. Thereby Kaltenbrunner was but prepared to take over the agencies of the domestic and foreign intelligence service, namely in the direction of absorbing and connecting the political intelligence service with the hitherto military one of Admird Canaris. No doubt it is true the witnesses Waneck, Dr Hoettl, Dr Mildner and Ohlendorf and also the defendant himself have testified that Himmler in making allowance for Kaltenbrunner's wished, from the murder of Heydrich, interpolated himself into the executive body, so that nothing of some importance took place in any executive field in Germany without himmler having had the final word and thus issuing the decisive order.

The witness Waneck confirmed the subject of those two conversations of Kaltenbrunner with Himmler in the following words, which I shall quote because of their importance: "When material problems arose Kaltenbrunner frequently remarked that he had come to an understanding with Himmler to work rather in the field of the foreign political intelligence service and that Himmler himself wanted to take more influence in the executive functions. To my knowledge Himmler agreed to these adjustments, the more so as he believed that he could depend on Kaltenbrunner's political instinct in foreign affairs, as this was apparent from various remarks made by Himmler." Various witnesses testified that Kaltenbrunner predominantly and from inner necessity actually made himself over to the Intelligence service in domestic and foreign countries and more and more approached an influence on domestic and foreign politics he was hoping for. I am calling attention to Waneck, Dr. Hoettl, but then also to the defendant Jodl and Seyss-Inquart and Fritsche. Dr. Hoettl testified: "In my opinion Kaltenbrunner never completely mastered the large agency of the Reichsicherheitshauptamt and, from lack of interest for police and executive problems, occupied himself far more with the intelligence servce and with the influence on the entire policy. This he considered his real domain." From the testimony by Generaloberst Jodl I am stressing the following sentences: "Before Kaltenbrunner took over the intelligence service from Canaris he sent to me, from time to time, very good reports from the Southeaster territory, through which

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I first noticed his experience in the intelligence service....I had the impression, this man knows his business; I now received currently reports from Kaltenbrunner, the same as before from Canaris; not only the actual reports from agents but from time to time he sent to me, I almost want to say, a political survey on the basis of his individual reports from agents. I noticed especiallt these conddensed reports on the entire political situation abroad because they revealed, as never before under Canaris, a frank, sobriety, and the seriousness of our entire military position."

The results therefore, which I must read from the evidence, is as follows:

Kaltenbrunner on the basis of the separation of the intelligence service from the executive police functions desired by him actually held a position in the Reichssicherheitshauptamt which was principally aimed at the intelligence service and its continuous development. I had this intelligence comprised in the meantime, in Europe, from Stalingrad to Leningrad, and t on to the Balkans. Kaltenbrunner was the most capable of all the authorities who in Germany wished to find a place for the enemy nation.

That was the lifework of this man as he himself wished it to be for the duration of the war. Personally he lived in small economic circumstances and it is the truth when I say, that he steps off the stage of political life just as poor as he ascended it. The witness Waneck once made the statement, characteristic for Kaltenbrunner, that he, Kaltenbrunner, will retire completely from office after the war and return to the land as a peasant.

Only with deep regret will the spectator see that under the pressure of the political and military events this man did not observe theborder-line as desired by himself. His obedience toward Hitler and therfore also toward Himmler had submitted to the apparent necessity in the years 1943/45, to guarantee the stability of the inner-German relations through police compulsion Thereby he became involved in guilt; it is clear, that he can count on a milder judgement of his guilt before the world conscience only if he could have produced evidence that he actually undertook a strict separation from section (Amt) IV of the Secret State Police rightly called demoniacal, if he had in no way participated in the ideas and methods, whic, as I believe, eventually led to the institution o f this trial. I cannot deny that he did not undertake this separation. Nothing is clearly proven in this direction, even his own testimony speaks against him. Thus his statement before the tribunal at the beginning of his interrogation may be explained, which I should like to define as the thesis of his guilt:

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Question: "Do you realize that very special accusations have been brought against you? The prosecution accuses you of crimes against the peace as well as of your role of an intellectual principal or of a participator in committing crimes against humanity and against the laws of war. Finally the prosecution has connected your name with the terrorism of the Gestapo and with the cruelties in the concentration camps. I now ask you: Do you assume the responsibility for these points of accusation in such manner as they are outlined and familiar to you?"

And Kaltenbrunner answers: "First of all I should liketo state to the court that I am fully aware of the serious nature of the accusations brought against me, I know that the hatred of the world is directed against me, since I am the only one here, because a Himmler, a Mueller, a Pohl are no longer alive, to answer to the world and to the court . . . . I want to state at the very beginning, that from the time of my appointment as chief of the Central Reich-Security-Office (Reichssicherheitshauptamt) I assumed the responsibility for every wrong committed within the jurisdiction of this agency as far as it occurred under my actual command, and I thus knew or should have known of these occurrences."

Thus the duty of the defense is automatically divided by asking the questions:

1. What did Kaltenbrunner do, good and evil, from his appointment as chief of the Reichssicherheitshuaptamt on 1 February 1943?

2. To what extent can it justly be said that in the essential points he did not possess sufficient knowledge about all the crimes against humanity and against the laws of war?

3. In how far can his guilt be established from the viewpoint that he should have known about the serious crimes against International Law in which Section (Amt) IV of the Reichssicheheitshauptamt (Secret State Police) was directly or indirectly involved?

1. What has Kaltenbrunner done?

In this connection, I am passing over the accusation brought against him by the prosecution for his participation in the events of the occupation of Austria and Czecho-Slovakia; no matter with what energy he followed his goal to see his Austrian homeland incorporated into the German Reich, and to the end of this realization use the SS forces under his co mmand; this aim can not have been a criminal one according to the world-c onscience.

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Just as little could one, because of the forcible means at that time employed to accomplish the annexation of Austria, which was historically due and desired by millions, reach a verdict of guilt. Kaltenbrunner was still much too insignificant a man for that. Economic distress - Anschluss movement - National Socialism: This was the way of the majority of the Austrian people, not the National-Socialist ideology; for Hitler himself was from the standpoint of Austrianism a spiritual and political renegade. Yet the Austrian Anschluss movement was a peoples' movement before National Socialism had reached any importance in Germany. Austria wanted to protest against the Versailles and St. Germain ruling, which forbade the Anschluss, by holding a plebiscite in each "Land". After 90% had voted in Tyrol and Salzburg, the victorious powers threatened to discontinue the shipment of food supplies. Hitler's seizure of power paralyzed the desire for Anschluss among those not of the party, but the distress in Austria become still more acute and isolated during the Dollfuss-Schuschnigg regime. The incorporation into the Greater-German sphere of economics, where the removal of mass-unemployment seemed to be the source of hope, appeared to the greatly distressed Austrian people as the only way out. The wave of enthusiasm which on 10 October 1938 went through all of Austria was real. To try and deny this today would be to falsify history. The Anschluss, and not the Dollfuss-Schuschnigg government, was based on democracy. Just as little can one, I believe, according to the reasons mentioned above, reach a verdict of guilty for Kaltenbrunner because of his alleged activity in the question of Czechoslovakia. In my opinion the question of guilt and expiation becomes acute only for the time after 1 February 1943. The indignation of the German people over one of the most infamous terroristic measures, the taking into protective custody, had already before this date become immense. Is it correct to say that Kaltenbrunner himself, of whom many orders for protective custody bearing his signature are in evidence before the court, inwardly abhorred this type of suppression of human liberties ?

May I refer to just a few sentences from his interrogations ?

Question : "Did you know that protective custody was at all permissible and was used frequently ?"

Answer : "As I have related, I discussed the idea of "Protective Custody" with Himmler already in 1942. But I believe, already before this time I had corresponded quite extensively on this subject with him, as well as once also

with Thierack. I consider protective custody, as applied in Germany, only in a smaller number of cases a necessity of state, or better, a measure such as is justified by war. For the rest I often, and well founded according to the history of law, voiced my opinion and turned against this conception and against the application of any protective custody in principle. I had several discussion about it with Himmler and with Hitler also. I had publicly taken my stand against it at a meeting of prosecutors, in 1944, because I have always been of the opinion that a man's freedom is one of his highest possessions and only the lawful sentence of a regular court of justice rooted in the constitution may limit or take away this freedom.

Here the same man expresses the right principles, the observance of which would have spared the German people and the world from untold suffering, and the non-observance of which constitutes the guilt of this man, who, in spite of his right perception, suited his actions to the so-called necessity of the State. He thereby, against his own will and knowledge, became subject to the principle of hatred, which sooner or later will always shake or shatter the foundations of the strongest state. "Right is what benefits the people", Hitler had proclaimed. I well believe that Kaltenbrunner today deeply regrets to have adhered too long to this maxim, and without putting up sufficient resistance.

Although the prosecution has not been able to produce even one single original signature of Kaltenbrunner in connection with orders for protective custody, and I do not think it incredible when Kaltenbrunner deposes that never did he himself put into effect such an order for protective custody by his signature, nevertheless, in view of the tragical results due to so many of these orders, I do not need to say even one word as to whether he is entirely blameless or is much less to blame because these orders had perhaps been signed without his knowledge; then of course the question arises immediately how such an occurrence could be possible in, it is true, an extraordinarily large office. Be that as it may; in affairs of such depth and such tragic outcome one does not feel inclined to make any difference between knowledge and ignorance due to negligence because one wants to hold everyone occupying a post in an office responsible for what happens there. This recognition is also the meaning of Kaltenbrunner's statement regarding his fundamental responsability as cited above. Where the happiness and fate of living men are involved

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it is impossible to retreat under the pretext of ignorance in order to avoid punishment, at best for the purpose of mitigation of sentence. The defendant knows this too. Orders for protective custody were the ominous harbingers of the concentration-camps. And I am not giving out a secret when I say that the responsibility for issuing orders for protective custody includes the beginning of responsibility for the fate of those held in the concentration camps. I could never admit that Dr. Kaltenbrunner may have known of the excesses suffering of the thousands who languished in the camps; for, as soon as the gates of the concentration camps were closed, there began the exclusive influence of that other office, the frequently mentioned central department for economy and administration. Instead of referring to many statements of witnesses to this point, I refer to the one of the witness Dr. Hoettl who, when asked about subordination in rank, replied :"The concentration-camps were exclusively under the command of the SS-Central office for economy and administration, hence not under the central RSHA main office and there were not under Kaltenbrunner. In this sphere he had no authority of command and no competency." Other witnesses have said that of necessity Kaltenbrunner should have had knowledge of the sad conditions in the concentration camps, but there is no doubt that the commandants of the concentration-camps themselves deliberately concealed penal excesses of the guards even from their superiors. It is furthermore a fact, that the conditions found by the Allies upon their arrival were almost exclusively the results of the catastrophic military and economic situation during the last weeks of the war and which the world mistakenly took for general conditions of former times. The above statement is fully verified by the statements of the camp-commandant of Auschwitz, Hoess, who, because of his later activity in the system of concentration camps of the central office for economy and administration, had made an accurate survey. For Hoess there exists no inward reason whatsoever to give a false testimony. A person like him, who has sent millions of men to their deaths, comes no longer under the authority of human judges and considerations. Hoess stated : "The so-called mistreatment and tortures in the concentration camps were not, as assumed, a method. They were rather excesses of individual leaders, sub-leaders, and men who laid violent hands upon the inmates." These elements themselves were, according to the statement of Hoess, taken to task for that. I believe I need not go into any more details of how, according to various witnesses, visitors

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of the concentration camps were impressed and surprised by the good condition, cleanliness and order in the camps, and therefore non suspicion was aroused as to special sufferings of the inmates. But it would be worse than bad taste if I contested the fact that a chief of the intelligence service, if only on the basis of foreign news of atrocities, should not have felt the responsibility in the interest of humanity to clear up any doubts arising along that line. This lack of knowledge seems to be confirmed by the statement of Dr. Meyer of the International Red Cross for the permission to have the International Red Cross visit the Jewish Camp at Theresienstadt and to allow food and medical-supplies to be sent in, coming from Kaltenbrunner, seems to be proof of the bad conditions in the camps during the last months of the war; nobody would allow neutral or foreign observers to have insight into the camps, if it had been known that crimes against humanity occurred regularly in the camps, as is asserted by the prosecution. In any case, I do not come to the result that Kaltenbrunner had full knowledge of the conditions in the concentration camps, but that it was his duty to investigate into the fate of those who were imprisoned. Kaltenbrunner might have found out then, that a considerable number of the inmates were sent to the camps because they were criminals, a much smaller portion was there because of their political or ideological viewpoints or because of their race; but then he would have found out about those primitive offenses against humanity, about those excesses and all the distress of these people, that I do contest in agreement with Kaltenbrunner.

The way to arrive at the truth was immensely complicated in Germany, and even the chief of the RSHA found nearly unconquerable obstacles in the hierarchy of jurisdiction and authority of other offices and persons. The improvement of the sad lot of the internees was from 1943 a problem which could have been solved only through the dissolution of such camps. A Germany of the last 12 years without any concentration camps would, indeed, have been an utopia. On the whole, Kaltenbrunner was but a small wheel of this machinery. In the preceding paragraph, I spoke about the subject of the orders for protective custody and of their effect.

Dr. Kaltenbrunner has affirmed the necessity for work education camps, owing to - as stated by him during his examination - the conditions then prevailing in the Reich, to the short comings of the labor market, and to other reasons, and if I am not mistaken, no convincing proof was submitted of mistreatment and cruelties in such camps . The reason may well lie in the fact

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that these camps were in some respects only related to, but not on equal footing with concentration camps. With all available means of evidence, Kaltenbrunner has opposed the accusation of having covered orders of execution with his signature. The witnesses Hoess and Zutter state that they saw such orders in isolated cases. The prosecution, however, does not seem to have proved that any such orders were issued without judicial sentence or without reasons justifying the death, with the exception of a particularly serious case reported from hearsay by the witness Zutter, adjutant of the camp commandant of Mauthausen. Thereby, a teletype, signed by Kaltenbrunner, is said to have authorized, in the spring of 1945, the execution of parachutists. An original signature by Kaltenbrunner is entirely lacking. I think I may assert that he did not sign any such orders concerning life and death, because he was not authorized to do so. Dr. Hoettl as a witness stated : "No, Kaltenbrunner did not issue such orders and could not in my opinion give such orders (for killing Jews) on his own accord". And Waneck explicitly confirmed as follows :

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It is known to me that Himmler personally decided over life and death and other punishment of inmates of concentration camps.

Thus the exclusive authority of Himmler in this sad field may be considered proven.

It would however the presumptious if I were to deny the guilt of Kaltenbrunner completely on this point. If such orders were executed on members of foreign powers, for example based on the so-called "Commando-Order" of Hitler of 18 October 1942, then there arises the question of the responsibility of that person whose signature was affixed to those orders, because the misuse of his name by subalterns was possible. It is certain that Kaltenbrunner had exerted not the least influence in originating the "Commando-Order". It can, however, hardly be doubted that this decree in itself constituted a violation of International Law. The development of the second World War into a total war by necessity created an abundance of new stratagems. Even where bona fide soldiers were employed in their execution, a motive of bitterness, humanly quite understandable, over the perhaps gangsterlike conduct of command troops concerned and other things could not justify the order. Fortunately but very few people fell victim to this order of Hitler as defendant Jodl has testified. Perhaps one would ask me whether it is my duty or whether I am only permitted to reiterate such points of incrimination as I have just done, since this seems to be the task of the prosecution. To this I reply: If the defense is so liberal as to admit the negative side of a personality, it surely is apt to be heard more readily when it approaches the Tribunal with the request to appraise the positive side in its full significance.

However, is there a positive side at all in the present case? I believe, I may answer that question in the affirmative. I already pointed out several facts which are connected with the time of the assumption of office by Kaltenbrunner. During the short time of 2 years of activity, this man has made himself a bearer of happy and humane ideas. I wish to remind of his attitude toward the lynch-order of Hitler with respect to shot-down enemy aviators.

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The witness, General of the Air Force, Koller portrayed the decent conduct of Kaltenbrunner which led to a total sabotage of this order. After first describing the contents of Hitler's order and Hitler's threat then pronounced during the discussion of the situation, namely that all and any saboteurs of this order shall be shot dead, Keller continues to repeat the assertions of Kaltenbrunner.

Permit me to quote a few sentences of the statements of Koller.

"Kaltenbrunner said: The tasks of the SD are continuously given a wrong interpretation. Such matters are not the concern of the SD. Moreover, no German soldier will do what the Fuehrer demands. He does not kill prisoners and if a few fanatic partisans of Mr. Bormann try to do so, the German soldier will interfere.... Furthermore, I myself will do something in this matter...."

Koller and Kaltenbrunner, in other words, were fully agreed on that matter. This positive action of Kaltenbrunner, important for the judgment of the actual nature of his personality, does not stand alone. Witness Dr. Hoettl confirmed the fact that in questions of the future fate of Germany, Kaltenbrunner went, if not beyond, at least up to the borderline of high treason. This witness for example confirms that Kaltenbrunner in March 1944 caused Hitler to moderate the plans concerning the Hungarian question, and that he succeeded in preventing the entry of Rumanian units into Hungary.

Dr. Hoettl then says literally:

"Since 1943, I advocated towards Kaltenbrunner that Germany must attempt at all cost to end the war. I informed him of my connections with an American authority in Lisbon. I also informed him that by way of the Austrian resistance movement I had taken up new contacts with an American authority abroad. He declared to be prepared to go to Switzerland with me and there to take up personally negotiations with the American representative, in order to prevent further useless bloodshed."

The depositions of witness Dr. Neubacher run along the same lines. This witness testified to an important positive human action

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of Kaltenbrunner. Upon the question whether Kaltenbrunner had assisted the witness in moderating, as much as possible, terror policies in Serbia, Dr. Neubacher answered--and I quote--:

"Yes, in this field I owe much to the assistance of Kaltenbrunner. The German police agencies in Serbia knew of me and of Kaltenbrunner that he, in his capacity as Chief of the Foreign Intelligence Service uncompromisingly assisted my policies in the southeastern territory. Thereby my ability to influence the police offices was accomplished. Kaltenbrunner's assistance was of value in my aspirations to overthrow the then prevailing system of collective responsibility and repression with the aid of judicious officers."

I am further mentioning the relief work of the Geneva Red Cross, which is due to the initiative of Kaltenbrunner. The activity of the defendant with respect to this, was portrayed by the witness Professor Burckhardt, Dr. Bachmann and Dr. Meyer. As a consequence many thousands were able to exchange their captivity for liberty. I should like to draw your attention to a few words submitted by the defendant Seyss-Inquart on two points. He mentioned that Kaltenbrunner worked for a complete autonomy of the Polish state as well as for the reintroduction of the independence of both Christian Churches. I might add that Dr. Hoettl testified that right from the beginning of his activity Kaltenbrunner took care of that position, during which he overcame the energies and resistance put up by Bormann.

Kaltenbrunner tried to realize his human intentions not only in this field. Therefore, it seems to me to be of significance to point out his efforts to make Austrian Gauleiters understand that any resistance against troops of the Western powers would be senseless, and that in view of this, irresponsible orders for resistance were not to be issued. This was confirmed by the witness Waneck. The prosecution held Kaltenbrunner responsible for the evacuation and planned destruction of certain concentration camps. I believe this proof may not only be considered as unsuccessful, but

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rather as a proof for the contrary. Upon the question addressed to Dr. Hoettl, whether Kaltenbrunner had instructed the Commandant of the concentration camp Mauthausen to surrender the camp to the advancing tropps, Dr. Hoettl answered:

"It is correct that Kaltenbrunner issued such an order. He dictated it in my presence for transmission to the Camp Commandant."

As a supplement, Kaltenbrunner during his personal examination, declared very logically:

Even if, according to his orders, the camp Mauthausen, filled with professional criminals, was not to be evacuated, an order to evacuate Dachau was devoid of any basis by reason of its -- compared with Mauthausen--harmless inmates. According to the testimony of Freiherr von Eberstein, the destruction of the concentration camp Dachau with its two secondary camps was the wish dream of the then Gauleiter of Munich, Giessler.

Finally the witness Wanek confirmed the fact that such an order of Kaltenbrunner had not become known to him; that, however, due to his position with Kaltenbrunner he would have known it had such an order been issued by the latter or even if the issuance of such an order had been taken into consideration.

Who actually issued these orders, can no longer be established with certainty. The witness Hoess in his examination, mentioned an order of evacuation by Himmler as well as directly by Hitler. In this connection it seems appropriate to me to point to Kaltenbrunner's participation in the said case of Sagan as charged by the prosecution. With reference to Kaltenbrunner's statement, confirmed by the examination of the witness Wielen, it appears to me to be a proven fact that this matter came for the first time before Kaltenbrunner only several weeks later, after the conclusion of this tragedy.

It also appears to me doubtful whether the so-called task units the Einsatz group, deployed upon the basis of Hitler's "Commissar Order" of 1941, were still in existence and functioning after the appointment of Kaltenbrunner. Some facts speak for it; others

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against it. Kaltenbrunner denied the existence of these groups for the period of his office as Chief of the Reichssicherheitshauptamt. I do not want to lose myself in details but I should like to draw the attention of the Tribunal to these doubts. The same applies, for example, to the bullet decree, the Kugelerlass, Document PS 1650, which confirms that it was not Kaltenbrunner but Mueller, the infamous Chef of Amt IV who signed the instructions involved, while document PS 3844, deals with personal signatures of the defendant. It appears to me that the first document deserves preference. May I finally draw your attention to such documents, which are rather inconclusive, insofar as they are based upon indirect observation.

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I trust that the Tribunal possesses sufficient experience in evaluating evidence so that I do not have to argue about this any further.

I have thus far voluntarily conceded the negative so that I may be the more justified in emphasizing the positive in Kaltenbrunner's personality. But how far, however, will I be justified in stating that Kaltenbrunner had actually insufficient knowledge of many war crimes and crimes against humanity which in the course of the last 3 years of war were committed with some kind of participation of the Section IV (Gestapo)? Would such a defense offer the prospect of essentially exculpating the Chief of the Reichssicherheitshauptamt? Kaltenbrunner admitted during his examination that he received knowledge of orders, instructions and directives, unmindful of their originating long before, in some instances even several years before his assumption of office, only very late, sometimes as late as 1944 or 1945.

And here I add that I wish to emphasize at this point, particularly, that those orders, contrary to international morals and decency, do eventually go back to a time during which Dr. Kaltenbrunner was still living in Austria. I will not at this moment try to prove in detail these statements of Kaltenbrunner.

The Prosecution is out to find exclusively whether such orders, decrees, directives, etc., were also executed during the period of time in which the defendant was in office as head of the Reich Security Main Office. It is also often very difficult for the defense counsel to follow up the secret channels of knowing or not knowing the defendant. Perhaps the defense counsel sometimes lacks the necessary distance for a free judging in view of the hecatombes of victims spread out across a whole continent and he is unjust. I add that we may leave the character formation of the defendant to history as, even if it is too late, the defense counsel may fail if he wishes to draw the picture of his client.

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At his interrogation at court Kaltenbrunner once explained the difficult positi[illegible] he was in when he took over his office on February 1st 1[illegible]43, and I hope that nobody will misjudge this situation. The Reich was still fighting and even in 1943 still dangerous for any adversary colliding with it. But it was already clear that it was a fight for a goal in the infinitely far away and out of reach. Who tries to hold back the spokes of the wheels of a carriage rolling into an abyss at top speed will perish. Couples with those conditions, from which there was no way of escaping, there was an officiousness, uncreative and caused by nervous insecurity in all areas of private and public life. Kaltenbrunner said with regard to this situation:

"I beg you to put yourself into my situation. I came to Berlin in the beginning of February 1943. I began my work in May 1943, except for a few visits of instruction. In the fourth year of the war the orders and decrees of the Reich had piled up also in the executive sector already to many thousands on the tables, and in the filing cabinets of the civil service. It was quite impossible for a human being to read through all that, even in the course of a year. Even if I had felt it to be my duty, I could never possibly had made myself acquainted with all those orders".

In connection with this I remind you, respectfully, that according to the evidence given by the witness, Dr. Hoett and others, the REHA in Berlin had 3,000 employees of all categories when Kaltenbrunner was in office, and that according to the statement of the same witness, Kaltenbrunner never dominated this office completely.

Nobody will be able to deny justification of the question, whether it was Kaltenbrunner's duty to have himself informed in the shortest possible time about the most essential proceedings, at least in all the offices of the Main Office for Reich Security and whether he would not then very soon, after all, have obtained knowledge of, for example, Himmler's and

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Eichmann's Jewish operation and many other serious terrorist measures. I may remind you that Kaltenbrunner, in answering my question, declared repeatedly and emphatically before this Tribunal, that he protested regularly every time he heard of such occurrences, addressing himself to Himmler and even Hitler, but that he had had but little success and that only after a long while. The defendant, for example, traces back the stopping of the extermination of Jews by a n order of Hitler in October 1944, to his personal initiative. However difficult it may be to judge whether the power and influence of a single would have been sufficient to bring about the suspension of a program of extermination, already in its final phase, I believe I may say, without being incorrect, that many tens of thousands of Jews owe it to this man that they escaped the hell of Auschwitz and still see the light of the sun. From the statements of Messrs. Dr. Brachmann and Dr. Meyer of the International Red Cross, it appears that Kaltenbrunner asked the International Red Cross to organize relief-shipments to a large Jewish camp at Unskirchen near Wels.

Witness Wanek has charaterzied Kaltenbrunner's attitude towards the question of Himmler's Jewish policy as follows: He says:

In the daily haste of our joint foreign-political labors and discussias, we did not touch the problem of the Jewish policy any more. At the time Kaltenbrunner came into office this question was already so far advanced that Kaltenbrunner could not have had any more influence on it. If Kaltenbrunner expressed himself at all on the subject, it was to the effect that mistakes had been made here that could never be made good."

This witness then finally confirms that this operation was conducted independently of this enterprize, owing to, and through the direct channel of the command of Himmler-Eichmann and says that the position of Eichmann, which already had been a dominatin one when Heydrich was still alive, had increased steadily, so that eventually he would have acted completely independently in the entire Jewish sphere.

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And here I add that, according to Hoess' statement, the only man left alive who is familiar with this question, it is a proven fact that only about two to three hundred people know of that dreadful order of Himmler's which was given during a conference which lasted for ten or fifteen minutes, the order on the basis of which more than four million people were exterminated. And I add that about these things, a nation of eighty million could have known little or probably nothing, matters which happened in the southeast of the Reich during the war.

Professor Burckhardt states that Kaltenbrunner, when discussing the

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Jewish question declared: "It is the greatest nonsense; all the Jews should be released, that is my personal opinion. But in spite of all this, the fundamental question is raised for the problem of guilt: may a high official and the director of an influential office, whose subordinates in a far-reaching hierarchy continuously commit crimes against humanity and against the rules of international law, assume such an office at all or remain in such an office, although he condemns these crimes. But is it perhaps a different case, if this man has the intention of doing all that is humanly possible to break the chain of crimes and thereby finally to become a benefac of humanity? The last question is in my opinion to be answered in the affirmative. It is to be appraised solely from the standpoint of the highes ethic principles.

My further thought in this connection is the following: he who invoke his philanthropic intention is free of guilt if, from the first day of his taking over such an office, he refuses all active participation in the direct commission of injustice and even going beyond this, however, uses every conceivable possibility nay, seeks it out, in order to achieve the elimination of unjust orders and their execution through his never ending resistance and every kind of human cunning.

The defendant himself has also sensed and clearly recognized all these things. On account of the importance of thequestion I should like to refer to his interrogation:

"Question: I ask you whether there was a possibility that you might have brought about a change after having gradually learned the conditions in the Secret State Police and in the concentration camps, etc. If this possibility existed, will you then say that an alleviation, i.e. an improvement, was brought about in the conditions in these fields due to your remaining in office?

Kaltenbrunner says: "I repeatedly applied for service at the front. But the most burning question which I had to decide for myself was whether the conditions would be thereby improved, alleviated or changed. Or is it your duty to do all that is possible in this position to change all the conditions that have here been so severely criticized? As my repeated demands to be sent to the front were refused, all I could do, therefore, was to make a personal attempt to change a system, the ideological and legal

foundations of which I could no longer change, which has been illustrated by all the orders presented here from the period before I was in office; I could only try to moderate these methods in order to help to eliminate them definitely.

"Question: And so, did you consider it consistent with your conscience to remain in spite of this?

"Answer: In view of the possibility of constantly using my influence on Hitler, Himmler and other people, I could not in my opinion reconcile it with my conscience to give up this position. I considered it my duty to take a personal stand against injustice."

As you see the defendant appeals to his conscience and you have to decide, whether this conscience, taking into consideration duty towards one's own country but also towards the community of manking has failed or not.

The duty which I have just mentioned, to resist the orders of evil, exists in itself for every human being, regardless of his position. This duty is expressly affirmed by Kaltenbrunner also. He who holds a state-office, must in the first place be able to prove that he contributed toward abolishing the gigantic injustice which occurred in Europe as soon as he learned of it, if he does not want to become guilty. Has Dr. Kaltenbrunner presented sufficient proofs? The answer to this question I leave to your judgment. But one thing I should like to express as my opinion: This man was no conspirator, but rather he was exclusively a man acting under orders and under compulsion.

Himmler's order was to take over the Main Reich Security Office. Is it tight that a given order should change the fundamental aspect of the problem? This question is of the highest importance. The Charter of this Tribunal has forbidden appealing to orders for the purpose of avoiding punishment. The reasons given for this by the American chief prosecutor proceeded from the presumed knowledge of the crimes or their background in the minds of the higher leaders which, therefore, prevented him from appealing to orders given. Like a red thread the fact runs through this trial that hardly one high official in whatever position of public life he may have been, was put into office without the order of the highest representative of the legal authority of the state; for in the last three years of the war the already clearlydistinguishable inevitable destiny of the Reich meant for the holder of a high office the renunciation of that part of life which many people say makes life worthwhile.

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Even during the duration of the war, orders held the office holder fast in his position as with an iron ring. There is also no doubt that he who refused to obey an order, especially in the last years of the war, had to fear his own death, and possibly also the extinction of his family.

From whatever side we approach the problem of orders in Germany after 1933, the appeal to the above-mentioned state of necessity ought not to be denied to the defendant, because that principle of necessity, which exists also in the German criminal code and which probably exists in the criminal codes of all civilized nations, is based on the freedom of the individual being necessary for the affirmation of any guilt.

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If the perpetrator is no longer free to act, because another person deprives him of this liberty by endangering his life, then, on principle, he is not guilty. I do not want at this instant, to examine whether in the German world of reality of the last years such a direct immediate danger for one's own life always existed, an encroachment upon the freedom of the man receiving orders existed in smaller or larger dimension without doubt. It seems certain to me that Himmler would have interpreted a refusal of Kaltenbrunner to take over the direction of the Reich Security-Main Office as sabotage and would, as a necessary conclusion, have eliminated him.

Hitler was one of the greatest breakers of law that world history has ever known. Many even affirm the duty to kill such a monster, so as to guarantee for millions of human beings the right of freedom and life. At these trials the most different points of view with regard to the "Putsch" especially the killing of the tyrant, have been preferred by witnesses and defendants. I cannot recognize the duty, but the right is certainly not contestable. If the oppression of human freedom occurs by means of a clearly unjust, because misanthropic, order, the scales in the now ensuing conflict between obedience and freedom of conscience will be turned to the side of the latter. Also the so-called oath of allegiance could not justify a different point of view because, as everybody feels, the obligation to allegiance presupposes duties of both partners so that he who treads under foot the obligation to respect human conscience in the person of his subalterns loses, at the same moment, the right to expect obedience. The tortured conscience is freed and breaks the ties which the oath had created. Perhaps some persons will not agree with my point of view on this problem and will point at the necessity of an orderly state of community and the wholesomeness of obedience especially in the interest of this orderly state, or they will point at the prudence of those in command and at the impossibility of knowing and evaluating all such orders as the person in command can, they will point to patriotism and many more other points of view. And although all that may be correct, it remains the absolute duty, to resist an order, the purpose of which, clearly recognizable for a subaltern, contains the realization of evil and vidates unequivocally the sound sentiments for humanity and peace among peoples and individuals.

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The phrase "In the fight of a people for life or death there is no question of legality", is not thought out to the end.

Even the immediate danger of life of the person receiving the order could not induce me to change my conviction. Dr. Kaltenbrunner would not deny that he who stands at the head of an office of great importance to the community is obliged to sacrifice also his life under the above-mentioned provisions. If, however the direct present danger for his own life and that of his family cannot excuse him, it does moderate his culpability. Kaltenbrunner only means to point to this moral and legal evaluation of his position. Thus he emphasizes a fact, historically proven, which was one of the deeper reasons for the collapse of the Reich; for no living man can bring liberty, peace, and welfare to a country who himself carries chains reluctantly and has lost that freedom which is the decisive characteristic of all human beings. I believe Kaltenbrunner would like to be reborn and I know that he would fight for that freedom with his life's blood. Kaltenbrunner is guilty; but he is less guilty than he appears to be for the Prosecution. He will await your judgement as the last representative of an ominous symbol of a period of the Reich, darker and more laden with anguish than any other period and yet he was a man, one could not meet without a feeling of pathos.

THE PRESIDENT: The Tribunal will adjourn now.

(A recess was taken).

THE PRESIDENT: Yes, Dr. Thoma.

DR. THOMA (Counsel for defendant Rosenberg): May it please the Tribunal: The documentary file which was shown in this room and which was supposed to illustrate the Rise and Fall of National Socialism begins with a speech delivered by Rosenberg concerning the development of the Party up to the taking over of power. He also describes the Munich insurrection and says that in the morning of 9 November 1923 he saw police cars with machine-guns assembling in the Ludwigstrasse in Munich and he knew that the march to the Feldherrnhalle was imminent. Nevertheless he marched in the first lines. Today, also, my client takes the same position in face of the Indictment formulated by the Prosecutors of the United Nations. He does not want to be pictures as though nobody paid any attention to his books, his speeches and his publications. Even today he does not want to appear as another person than

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he was once before, a fighter for Germany's strong position in the world, namely a German Reich in which national freedom should be linked to social justice.

Rosenberg is a German born in the Baltic provinces, who learned to speak Russian as a young boy, passed his examination in Moscow after the Technical College in Riga moved to Moscow during the first world war, took an interest in Russian literature and art, had Russian friends, and was puzzled by the fact that the Russian nation, defined by Dostoyevsky as "the nation with God in its heart" was overcome by the spirit of materialistic Marxism and he considered it inconceivable and unjust that the right of self determination had often been promised indeed but never voluntarily granted to many nations of Eastern Europe which had been conquered by Tsarism as late as the 19th century.

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Rosenberg became convinced that the Bolshevik revolution was not directed against certain temporary political phenomena only, but against the whole national tradition, against the religious faith and against the old rural foundations of the Eastern European nations, and generally against the idea of personal property. At the end of 1918, he came to Germany and saw the danger of a Bolshevistic revolution in Germany too; he saw the whole spiritual and material civilization of the Occident endangered, and believe to have found his life-work in the struggle against this danger as a follower of Adolf Hitler. It was a p o l i t i c a l struggle against fanatic and well-organized opponents who disposed of international resources and international backing and who acted according to the principle: "Hit the Fascists wherever you can." But as little as one can deduce from the latter slogan that the Soviet entertained intentions of military aggression against Fascist Ital just as little one can say that the struggle of the National-Socialists against Bolshevism meant a preparation for a war of aggression against the USSR.

To the defendant Rosenberg, a military conflict with the Soviet Union, especially a war of aggression against the latter, seemed as likely or as unlikely as to any German or foreign politician who had read the book Mein Kampf. It is not right to maintain that he was initiated in some way in plans of aggression agai st the Soviet Union; he rather publicly advocated proper relations with Moscow (Document Rosenberg 7b, Page 147). Rosenberg never wanted a military intervention against the Soviet Union. However, he feared, in turn the entry of the Red Army into the border stat and then into Germany.

When in August 1939 Rosenberg learnt about the conclusion of the Non-Aggression Pact between the German Reich and the Soviet Union--he was as little informed about the preliminary discussions as he was about the other foreign political measures taken by the Fuehrer--he might have gone to see the Fuehrer and protested against it. He did not do it and he did not object to it with a single

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word, which the witnesss Goering confirmed as being a statement of Hitler's.

As a witness Rosenberg himself described (Transcript of 16 April 1946, Page 7894) that he was then suddenly called to Hitler at the beginning of April 1941, who told him that he considered a military clash with the Soviet Union as inevitable. Hitler offere two reasons for it:

1) The military occupation of Rumanian territory, namely Bessarabia and North Bukowina.

2) The tremendous increase of the Red Armies along the line of demarcation and on Soviet-Russian territory in general, which had been going on for a long time.

These facts were so striking he said, that he had already issued the appropriate military and other orders and he said that he would appoint Rosenberg in some way as a political adviser. As he further states as a witness, Rosenberg found himself confronted with an accomplished fact, and even the sole attempt to talk about it was cut short by the Fuehrer with the remark that the orders had been issued and that hardly anything could be changed in this matter. There upon Rosenberg called some of his closest collaborators together because he did not know whether the military event would take place very soon or later on, and he also had some plans made concerning the treatment of the political problems. On 20 April 1941, Rosenberg received from Hitler the preliminary order to establish a central office to deal with questions concerning the East and to contact the competent highest Reich authorities with respect to these matters (Document Number PS 865, USA - 143).

If this statement made by Rosenberg in itself is not sufficie to refute the assertion made by the prosecution according to which Rosenberg is "personally responsible for the planning and execution of the war of aggression against Russia"--(Brudno, on 9 January 1946, page 2278 of the Transcript)--and was aware of the "aggressi predatory, character of the imminent war"--(Rudenko, on 17 April 1946, Page 8016 of the Transcript)--if, above all, one does not

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want to admit that Rosenberg was convinced of an imminent aggressive war waged by the Soviet Union against Germany, I would like to bring up four more points in order to prove the correctness of the statements made by the defendant.

First, Rosenberg was not called to the well-known conference at the Reich Chancellery on 10 November 1937 ("Hossback Document" Document Number PS 386, USA-25)--when Hitler disclosed for the first time his intentions of waging war. This was at the time when Rosenberg still had political influence, or at least seemed to have it. If ever, he should have played the part of the intimate political instigator then.

Second, Lammers, in the capacity of a witness, stated before this Tribunal that Hitler took all important decisions all by himself; thus, also the decision concerning the war against Russia--(Transcript Page 7363).

Third, upon my question about Rosenberg's influence with respect to Hitler's decisions concerning foreign policy, Goering replied before this Tribunal, on 16 March 1946: "I think that after the accession to power the Fuehrer did not consult the Office of Foreign Affairs of the Party a single time about questions concerning the foreign policy, and that it was created only for centrally taking care of certain questions concerning the foreign policy which came up within the party. As far as I know, Rosenberg was certainly not consulted about political decisions after the accession to power." This was also confirmed by the witness Neurath on 26 June 1946, in this court room.

As my fourth argument, I would further like to refer to the "Brief report concerning the activity of the Office of Foreign Affairs of the NSDAP." (Document Number 003-PS, USA-603). Brief mention is made in it of the "Near East" in such a harmless manner that no word has to be said about it. Also, in the confidential reports 004-PS and 007-PS, nothing is said about any preparations against the Soviet Union.

It would be too easy, too superficial, and therefore unjust a

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procedure, if one would say:

First, the Eastern Territories were occupied in a war of aggression, and therefore anything the German Administration has done there was criminal;

Second, in his capacity of Reich Minister for the occupied Eastern Territories Rosenberg was the responsible minister and therefore he must be punished for all crimes which have occurred there, at least for what happened within the scope of the jurisdiction and authority of the administrative bodies. I will have to demonstrate that this conception is not correct for legal and factual reasons.

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Rosenberg was the organizer and the highest authority of the administration in the East. On 17 July 1941, he was appointed as Reich Minister for the occupied Eastern territories. According to instructions, he performed before that time, preparatory work on questions concerning East-Europe by contacting the Reich agencies concerned. He planned and set up his office for dealing centrally with questions concerning Eastern Europe. He had provisional instructions for the Reich Commissars drawn up--(Doc. No. 1030-PS)-- he delivered the program speech of 20 June 1941, and, above all, he took part in the Fuehrer Conference of 16 July 1941.

In the presence of Rosenberg, Lammers, Keitel, and Bormann, Hitler said at that time that the real aims of the war against Russia should not be made known to the whole world, that those present should understand clearly that "we will never withdraw from the new Eastern territories; whoever offers any opposition will be exterminated; never again must a military power develop west of the Ural; nobody but a German shall ever wear a weapon." Hitler proclaimed the subjection and the exploitation of the Eastern Territories, and in making those statements he was in opposition to what Rosenberg had told him before--without being contradicted by Hitler--concerning his plans for the East.

Thus Hitler probably had a program of enslavement and exploitation.

Nothing is so natural and nothing is easier than to say this: Before Rosenberg took over his Ministry he knew Hitler's aims for the East; namely, (1) to rule it; (2) to administer it; (3) to exploit it. Therefore, he is not only an accomplice in a crime of conspiracy against peace, he is also jointly responsible for the crimes against humanity perpetrated in the Eastern Territories, since Rosenberg held complete power, the highest authority in the East.

I shall deal later de jure and de facto, with the question of Rosenberg's automatic responsibility in his capacity as supreme Chief of the Eastern Territories. First I would like to consider

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the question of his individual responsibility. One could refer to two reasons: (a) because he allegedly participated in the preparation of the war of aggression against the Soviet Union -- I have already states that this assertion is not correct that Rosenberg has neither ideologically nor actually participated in the preparations of the war of aggression ; (b) because he supported Hitler's plan of conquest by making plans, delivering speeches, and organizing the administration.

When a minister or general, following the instructions of the Chief of State, elaborates plans or takes preparatory measures of an organizational nature for events which might happen later, this activity cannot be considered as criminal even when thereby the interests of other countries are affected, and even when the plans, preparations and measures are intended for war. Only when the minister or general in question directs his activity towards things which have to be considered as criminal, according to sound common-sense and an international sense of decency and justice, can he be held individually responsible. Rosenberg has continuously proved in words and deeds that the traditional conceptions of right are his conceptions also, and that he is willing to stand up for them. His position was particularly difficult indeed, since the supreme chief finally moved beyond the limits in his ideas, aims and intentions, and since other strong forces also like Bormann, Himmler and Gauleiter Koch were involved which prevented and sabotaged Rosenberg's good and fair intentions. Thus we witness

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the strange spectacle of a minister who governs but who partly cannot understand, partly cannot approve, partly does not know at all, the intentions of the Chief of State, and on the other hand that of a chief of State who appoints a minister to take office who is certainly an old and loyal political fellow-combatant but with whom he has no spiritual contact whatsoever anymore. It would be wrong to judge without further examination such constellations according to the democratic conceptions of the responsibility of a minister. Rosenberg could not simply resign, but he also felt inwardly the duty of fighting for the opinion which appeared to him as being right and decent.

In his speech of 20 June 1941 Rosenberg says that it is the duty of the Germans to consider that Germany should not have to fight every 25 years for her holdings in the East. He by no means, however, desires the extermination of the Slavs, but the advancement of all the nations of Eastern Europe, and the advancement, not the annihilation, of their national independence. He demanded (Doc. No. 1058-PS, USA-147), "friendly sentiments" towards the Ukrainians, a guarantee of "national and cultural existence" for the Caucasians; he emphasized that, even with a war on, we were not enemies of the Russian people", whose great achievements we fully recognize. He advocated "the national right of self-determination of the people" -- one of the first points of the whole Soviet revolution. This was his idea, tenaciously defended till the end. The speech in question also contains the passage, of which the prosecution acuses him in particular, that the feeding of the German people during these years willbe placed at the top of German demands in the East, and that the southern territories and North Caucasus would have to make up the balance in feeding the German people. Then, Rosenberg continues literally: "We do not see at all why we should be compelled to feed the Russian people also from these surplus regions. We know, that this is a bitter necessity which lies beyond any sentiment. Without a doubt an extensive evacuation will be necessary, and there are very hard years ahead for the Russians. To what extent industries are to be kept up there, is a question reserved for future decision." This passage comes quite suddenly and all by itself in the long speech. One feels distinctly that it was been squeezed in, it is not Rosenberg's voice: Rosenberg does not proclaim here a program of his own, but

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only states facts which lie beyond his will. In the first directives of the East ministry (Doc. No. 1056-PS, USA-605) the feeding of the population is shown to be especially urgent, as well as its supplying with all medical necessities. On the contrary, the true Rosenberg emerges in the conference of 16 July 1941, when in response to Hitler's plans, he called attention to the university of Kiev, and to the independence and cultural advancement of the Ukraine, and when he took stand against the full power of the police and above all against the appointment of Gauleiter Erich Koch in the Ukraine. (Doc. No. L-221).

One willsay: What is the use of opposition and protests, what is the use of secret reservations and of feigned agreement with Hitler's intentions, Rosenberg did cooperate all the same. Therefore he is responsible too. Later on, I willoutline in detail how and to what extent Rosenberg did adhere to the policy in the East, what things he did not do, and how he opposed them, what he planned and desired himself, in order to defend him against the grave charge of being responsible for the alleged exploitation and enslavement of the East. Here, I would like to point out the following: It was in no way a hopeless task to begin by accepting even Hitler's most passionate statements without contradiction in the hope and with the intention of attaining nevertheless a contrary result later on. In opposition to Hitler's statement, which said that :"No other than a German may ever bear weapons in the East", it was not long, for example, before, on Rosenberg's recommendation legions of volunteers were formed from the peoples of the East, and in opposition to Hitler, an edict of tolerance was issued at the end of 1941 for the churches of the East (Doc. No. 1517-PS.)

If, at first, Rosenberg could achieve nothing for the autnomy of the Eastern nations, he still adhered to his plans for the future in this respect too. First he took care of the urgent agrarian question. An agrarian order was drawn up, which it was possible to present to the Fuehrer on 15 February 1942, and which was authorized by him in its unadulterated form. It was not an instrument of exploitation, but an act of liberal formation of the agrarian constitution in the midst of the most terrible of wars. Right in the middle of the war the eastern countries not only received a new agrarian constitution but also agricultural machines. The witness Professor

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Doncker, in his affidavit, has born witness to the following deliveries to the occupied Soviet territories including the former border states:

	Number of Pieces	Value in Reichmarks
Plough tractors, 40-50 HP	about 7,000	about 45,000,000.--
Thrashing machines	about 5,000	about 20,000,000.--
Agricultural tools	about 200,000	about 30,000,000.--
Gas generators for German and Russian tractors	about 24,000	about 35,000,000.--
Reaping machines	about 35,000	about 15,000,000.--
Spare parts for German and Russian tractors and agricultural machines		about 10,000,000.--
Scythes and sickles		about 10,000,000.--
Miscellaneous (hand equipment, tools, driving-belts etc.)		about 15,000,000.--
	Total	about 180,000,000.--

I do not think one can say that these deliveries were made in view of an exploitation. So, in this, too, Rosenberg accomplished a piece of constructive work that was really a blessing.

In the following, I will first treat the question of Rosenberg's automatic responsibility as minister for the Eastern territories and then his criminal liability on the grounds of his official position.

On 17 July 1941, Rosenberg was appointed Reich Minister for the occupied Eastern territories. Two Reich commissariats were set up as supreme territorial authorities: "Ostland" (Estonia, Latvia, Lithuania and White-Ruthenia) under the Reich Commissioner Lohse and Ukraine under Reich commissioner Koch. The Reich commissariats were divided into general districts and regions. Right from the beginning, the East Ministry was not conceived as an administrative authority built on a large scale, but as a central office and supreme authority, which was to confine itself to overall instructions and fundamental directives, and in addition was to ensure the reinforcing of material and personnel. The actual government was the duty of the Reich commissioner; he was the sovereign in his territory.

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It is, moreover, of special importance, that Rosenberg as Minister for the East was not at the head of the whole Eastern administration, but that several top authorities existed at the same time. Goering, who was plenipotentiary for the four-year plan, was responsible for the control of the economy in all occupied territories, and in this respect had authority over the minister for the East, for Rosenberg could only issue economic decrees with Goering's permission. The chief of the German police Himmler was solely and exclusively competent for the security of the occupied Eastern territories as far as police authority was concerned; there was no police division at all in the ministry for the East, neither in the Reich commissariats. Rosenberg's competence was furthermore undermined by Himmler the "Reich commissioner for the preservation of German nationality", and by Speer, on behalf of whom a fuehrer-decree detached all technical matters from the East administration. It was further weakened by Goebbels who claimed for himself the control of propaganda in the occupied Eastern territories as well. Later on I shall come to the important question of labor employment which was put under the authority of Sauckel.

Nevertheless, Rosenberg was the minister responsible for the occupied Eastern territories. In this respect, the following must be emphasized: in this trial, Rosenberg is not made responsible from the political standpoint, since the high tribunal is no parliament; neither is he made responsible from the point of view of constitutional law, for the High Tribunal is not a Supreme Court of Judicature. The liability of the defendant with respect to civil law is not in question either; but only his penal liability, his responsibility for his own alleged crimes and for the crimes of others. I do not need to outline in more detail that for a penal liability and condemnation, it must be proved that the defendant culpably and illegally committed acts forming a case which is punishable by law, and that he may only be punished for a non-action, i.e. a commission, if he had the legal duty to act, and if it was due to his inaction that the criminal result occurred, i.e. if he had the factual possibility of preventing the criminal result.

It seems to me of decisive importance, that Rosenberg was a minister for the occupied Eastern territories, but not a sovereign. The Reich-

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commissioners were sovereigns of the gigantic territories "Ostland" and "Ukraine." The lines along which these territories were to be constitutionally remodelled were not visible yet, but one thing was certain:

The Reich Commissioner was the highest authority. For instance, it was he, who in the most important measures, like the shooting of inhabitants of a region for acts of sabotage, had the right to make the ultimate decision. In practice, in these cases, the police had exclusive competence. The Reich, i.e. partly the East ministry and partly other authorities, detained the right to make fundamental legislation and give overall supervision. By a slight change in the well known remark of Benjamin Constant, the French professor of constitutional law: "Le roi regne, mais il ne gouverne pas", one may define in the following way Rosenberg's position as minister for the occupied territories of the East: "Le ministre gouverne, mais il ne regne pas". As in certain dominions of the British empire, there existed a sovereignty of the Reich Commissioner with a central over-all supervision on the part of the minister for the East, as in certain districts of the British Empire. Today, nobody would think of summoning the competent English minister before a tribunal, because a governor in India had allowed native villages to be bombed and burned down. And so I come to my conclusion, that in Rosenberg's case there exists no automatic, penal responsibility for the non-prevention of crimes in the East, because although he had the authority of supervision

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he was not sovereign, the two Reich Commissioners had the supreme authority.

It must furthermore be asked and briefly examined, whether the defendant is individually responsible, i.e. individually guilty of criminal exploitation and enslavement of the nations of the East and, may be, of further crimes. What was his attitude, what were the general lines and general trends of his policy, what did he positively do and what did he prevent or at least try to prevent?

In the Baltic countries, national administrations (directorates) were installed under German supervision. The German administration was compelled by the Reich minister for the occupied territories of the East, to show the greatest understanding for all desires which could be gratified and strive for a good relationship with the Baltic countries; the Baltic countries had a free legal, educational and cultural system and were only limited with respect to questions concerning politics, economy and the police. After the war of 1914-1918 agrarian reform in the Baltic states was carried out at the expense of the 700 years old German property. Nevertheless, Rosenberg as Minister for the East, made a law giving back to private owners the farms which had already been collectivized in past by the Soviet Union after 1940, and in this restitution of the soil which had once been taken away from the German proprietors, showed the greatest good will conceivable on the part of the German Reich.

This, as well as the already-mentioned agrarian order has been expressly confirmed by witness Riecke (Transcript Page 8032).

In the general district of White Ruthenia, the independent administration was initiated under Reich Commisser Kube. The "White Ruthenia Central Committee" wasf ounded, furthermore a White Ruthenian relief system and a White Ruthenian youth organization. When a White Ruthenian youth delegation returned from a visit to Germany, Kube said, that he would continue to act as a father to the White Ruthenian youth and the following night he was murdered, but his policy was not changed. -- I should like toobserve in passing that the actual Russian territories between Narwa and Leningrad and around Smolensk had remained all the time under military administration. Likewise the districts around Kharkov and the Crimea.

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As far as the Ukraine is concerned, Rosenberg intended to give it as soon as possible, an extensive central self-administrative sovereignty, similar to the directorates in the Baltic states and pledged to a definite advancement of the fultural and educational needs of the people. After Rosenberg had originally thought that he could assume, Hitler agreed to this idea, another conception came to prevail, namely that all forces should be directed towards the war economy. Rosenberg only managed to achieve and carry through one thing: The new agrarian order of 15 February 1942 which provided for a transition from the collective economy of the Soviet Union to personal exploitation, and then to ownership by the peasants. On 23 June 1943 the property decree was issued as a complement to this. At first, it was not possible to carry it out because of Reich Commissar Koch's resistance, but then, military events brought everything to an end. A further fundamental decree was based on a general ddjustment of the school system, which Rosenberg had ordered to be worked out, because the Reich Commissioner of the Ukraine declined to do it himself. Rosenberg provided for elementary schools and higher technical schools, the Reich Commissioner protested against this. On account of the conflict which became more and more acute between Rosenberg and Reich Commissioner Koch, Hitler issued, in June 1943, the following written instruction: The Reich Commissioner had no right to make any obstructions, but the Reich Minister for the occupied territoriesof the East should confine himself to essential questions, and when issuing any orders should make it possible for the Reich Commissioner of the Ukraine to take up his position beforehand, which practically meant Koch's coordination along with Rosenberg.

During his examination of 8 April 1946 (Transcript P.7374) the witness Lammers described Rosenberg's peculiar constitutional position as Reich Minister for the occupied territories of the East, and his political position which became weaker and weaker. I would like to emphasize the following striking and especially important declarations made by the witness: the authority of the Reich Minister for the occupied territories of the East was undermined by the Wehrmacht, by Goering as plenipotentiary for the four-year plan, by Himmler as chief of the German police, by Himmler as Reich Commission-

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or for the preservation of German nationality (resettlement measures), by Sauckel as general plenipotentiary for Labor utilization, by Speer in the field of armaments and technique and finally through differences of opinion with propaganda minister Goebbels. Furthermore, Rosenberg was limited by the fact that two Reich Commissioners, Losse and Koch, were appointed for the occupied Eastern territories. The higher SS and police chief was "personally and directly" subordinated to the Reich Commissioner, but, as Lammers has declared, in technical respects he could not receive any orders from Rosenberg or from the Reich Commissioner but only from Himmler. - Hammers said furthermore: Rosenberg always wished to pursue a moderate policy in the East, he was without any doubt against a "policy of extermination" and against a "policy of deportation", which was often advocated by other parties. He made efforts to rebuil agriculture through the agrarian law, to put order into the educational system, church affairs, the universities and schools. Rosenberg had great difficulties in succeeding, for the Reich Commissioner for the Ukraine before all others simply did not follow Rosenberg's orders. Rosenberg was for setting up a certain independence of the Eastern nations, he especially had at heart the cultural interests of the latter. The differences of opinion between Koch and Rosenberg filled volumes of files. Hitler called Rosenberg and Koch, and decided that the should meet each month in order to consult each other. The witness Lammers said quite rightly that for Rosenberg as the superior minister it was unendurable to have to come to an agreement in each case with his subordinate the Reich Commissioner. Subsequently it was shown that in spite of the meeting they came to no agreement, and finally it was Mr. Koch who was right in the eyes of the Fuehrer. As Lammers finally says, it was about the end of 1943 that Rosenber was received for the last time by the Fuehrer, and before that time too he had always great difficulties in reaching the Fuehrer. There were no more Reich Cabinet sessions since 1937 already.

Hitler turned his attention more and more to the Bormann-Himmler group. The East became the ground for experiment. For this group, as is now quite clear today, it seemed hopeless to look for an understanding on the part of Rosenberg, for the development of the Reich as they wished it. Rosenberg had no idea of the extent of the fight put up against him. His argument

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with Reich Commissioner Koch, the exponent of Himmler and Bormann, is a proof of this ignorance, but it is also a complete proof of Rosenberg's integrity.

On 14 December 1942 Rosenberg issued an instruction to the Reich Commissioner of the Ukraine (1921-PS, Ro.11); his other instructions have unfortunately not been found. In this, Rosenberg requests the chiefs of the administration to preserve a decent attitude and views, he demands justice and human understanding for the population, which was always seen in Germany as the bearer of legal order; war brings terrible hardship, but every offense must be fairly examined and judged and must not be punished to excess; it is absolutely inadmissible that German agencies oppose the population with contemptuous speeches. One can only show one is the master by taking the right attitude and through one's actions, not by obtrusive behavior; our own attitude must bring others to respect the Germans; those chiefs of the administration, who have shown themselves unworthy of their task, who have misused the authority they were given and who by their pernicious behavior have become unworthy of our uniform, must be treated accordingly, summoned before a court or removed to Germany.

The echo, which such decrees aroused on the part of Koch, is shown in his memorandum of 16 March 1943 (192-PS, Ro.14). Koch writes: "It is strange, that not only a correct attitude must be taken with the Ukrainians, but that we must even be amiable to them and always ready to help".

Furthermore, Rosenberg demands esteem for the highly developed self-consciousness of the Ukrainian people and according to Rosenberg a high degree of cultural self-administration is desirable for the Ukraine, nations as big as the Ukrainian one is, cannot be kept in permanent dependence, the Eastern campaign is a political campaign and not an economic forage raid. Here Koch is speaking to Rosenberg in a cynical manner about the climax reached in the relations of his organization with Ukrainian emigration.

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There are other decrees of Rosenberg's which are criticized by Koch. One of these is the decree of 18.6.1942 concerning the acquisition by Rosenberg of Ukrainian schoolbooks for a total of 2.3 millions Reich Marks to be charged to the budget of the Reich Commissariat without even previously getting in touch with Koch. 1 million primers, 1 million spelling charts, 200,000 arithmetic books, were to be provided at a time when there was not enough left for German schoolchildren.

Koch goes on saying: it is not necessary to point out repeatedly in the decrees issued by your Ministry and in long-distance remonstrances that any coercion in hiring laborers should be avoided and that the East Ministry even demands to be informed of any instance inwhich compulsion has been used. By a subsequent decree Koch is blamed to have caused the closing of vocational schools and that Rosenberg ordered the General Commissars to adopt another school policy, circumventing the Reich Commissar's authority.

Koch then concludes with a veiled threat that to him, a veteran Gauleiter, the way to the Fuehrer would not be barred.

So much challenging criticism of Rosenberg, so much unintentional praise and so much proof of absolute decency of his behavior and the far-sighted and statesmanlike direction of his office as Chief of the East Administration:

The last document in the fight of Rosenberg against Koch is the report regarding the Reich Commissar Koch and the timber region of Zumand of 2 April 1943 (032-PS, regarding which Rosenberg gave exhaustive information as a witness. In this very matter Rosenberg displayed his conscientiousness so clearly. Transcript page 7930 and pages 8019-8021).

d) Rosenberg and Bormann

And now we have to unroll another scene before our eyes because the prosecution attached specific importance to it:

In July 1942, Bormann wrote a letter to Rosenberg, Rosenberg replied and a third party, Dr. Markull, an associate of Rosenberg in his Ministry, wrote a criticism of it. Transcript p. 7971). According to Dr. Markull's representation, the meaning of Bormann's letter, the original of which is not extant, contained the following points: the Slavs should work for us; if of no use for us, they ought to die; health provisions were superfluous; the

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fertility of the Slavs was undesirable, their education da gerous; it will do if they can count up to one hundred. Every educated person is a potential enemy. We were leaving them their religion as an outlet. As sustenance they should receive only the barest necessiti es, we are the masters and we come first.

To that letter of the closest collaborator of Hitler there could be only one reply by Rosenberg; feigned consent and feigned compliance. In the inner circle of the East Ministry there arose considerable apprehensions regarding this significant change in the attitude of their chidf, apprehensions which were expressed in Dr. Markull's memorandum of 5.9.1942. Rosenberg as a witness has stated and there cannot exist any doubt about it by reading that writing impartially, that he agreed only for the sake of pacifying Hitler and Bormann. He wanted to insure himself against an attack from the Fuehrer Headquarters which he anticipated with certainty, because he supposedly did more for the Eastern population than for the German people, because he required more physicians than there were available for sick Germans etc. The memorandum of Markull is the truest possible reflection of Rosenberg's personality and influence asit shows the anxious subordinate trying to conjure the former spirit of his Minister, as he got to know and to love him in his work, against an alien phantom who seemed to have taken his place.

It says there that though the train of thought conforms with the policy of the Reich Commissar Koch, but not with the decrees of the Minister and the conception of at least 80 percent of the regional commissars and specialists counting on their Minister, according to which decrees the Eastern pppulation should be treated decently and with understanding, that it is showing a surprisingly high capacity for culture, that their efficiency in work is good, but that we are about to dissipate a precious capital of gratitude, love and confidence. That the controversy between the Minister and the Reich Commissar was well known among the high authorities of the Reich and that it was no secret that the Ministry was unable to carry out its policies against the Reich Commissars, who considered the East Ministry as entirely superfluous. That the writings of Bormann would disavow the

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total policy of the Minister up to now and that one had the impression that Koch has been considered by Hitler as being right in his opposition to the Minister. That since its foundation the Ministry had to complain about an ever increasing loss of power. The higher SS and Police officials refused to render to the General Commissar the normal honors such as reports etc. One jurisdiction of the East Minister after another was transferred to different highest Reich authorities, in the offices in Berlin it was openly said that the r emodelling of the Ministry into a mere Operations staff (Fuehrungsstab) was to be expected. On the other hand, the Reich Ministry for the Occupied Eastern Territories, due to the personality of its leader enjoyed the exceptional respect of the public.

Dr. Markull implores the Minister to stand by his original ideas, that the unfortunate Master complex should be as much avoided as the opinion that the intelligentsia

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were alien to the masses.

The influence of spiritual forces should be taken into consideration. Germany must prove a "righteous judge", acknowledging the national and cultural rights of nations. Such has been the ideas of the Minister before and such they must remain.

Rosenberg's attitude did not change in fact, as at that very time he was working on the Great School Order (Schulverordnung). Later on he effected the reopening primarily of the medical faculties in colleges. And then it came to the conflict with the Fuehrer in May 1943.

On 12-10-1944 Rosenberg tendered his resignation through Lammers to the Fuehrer (Doc. No. Ro. 14), because of the German Eastern policies and the political psychological treatment of Eastern nations in particular and had been opposed from the very start to his previously conceived plan of autonomy of the Eastern nations and of the cultural development of their capacities amid an all-European conception of a family of nations on the continent. Now he had made up his mind seeing a great statesman-like program gone to pieces.

All he could do in regard to the policy of enslavement and looting which was going on in his country was merely to accept memoranda from his colleagues in the Ministry or at best indulge in a futile paper war with people like Koch.

He was not strong enough against the blinded forces in the East and what plans they wanted to carry out and he was powerless against their influence, being in addition totally unaware at that time of all police and army orders now presented here to the Tribunal.

When Rosenberg once reminded Hitler of the Foundation of a university in Kiev, Hitler apparently agreed. After Rosenberg had left and he was alone with Goering, Hitler said: "This fellow has special worries. We have more important matters on our minds than universities in Kiev!" (Transcript of 16-3-46, forenoon 1000-1300 hrs.). No episode can illustrate the theme better than all the documents: The theme, Rosenberg and reality in the East, and the other theme: Rosenberg as the alleged inspirator of Hitler. As Rosenberg did not receive any reply to the request for resignation, he tried many times to talk to Hitler personally. It was all in vain.

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On 11-12-45 Mr. Dodd said: "The system of hatred, barbarism and denial of personal rights, which the conspirators had elevated to the national philosophy of Germany, has followed the nati nal-socialist matters when they overran Europe. Foreign workers became the slaves of the master race, being deported and enslaved in millions." And on 3-2-1946 General Rudenko said "In the long line of ruthless crimes committed by the German fascist troops of occupation, the forcible deportation of peaceful citizens into slavery and bondage in Germany takes a particularly important place. For the inhuman and barbaris instructions, directives and orders of the Hitler government, whose purpose was the carrying out of the deportation of Soviet people into German slavery", he said, "Goering, Keitel, Rosenberg and Sauckel were particularly responsi[illegible].

I have already spoken of the formal and individual responsibility of Rosenberg as Reich Minister for the occupied Eastern territory. I have already explained, too, that in the field of labor employment it was not Rosenberg, but Sauckel who, as General Plenipotentiary for the Employment of Labor, was the highest instance and the responsible person, by virtue of the Fuehrer's decree of 21-3-1942 (Doc. No. 630-PS). Thus Sauckel in his field was Rosenberg's superior.

He wrote on 10-3-1942 to Rosenberg (Doc. No. 017-PS): "The Fuehrer has drawn up new and most urgent armament programs which require the speediest employment of 2 million additional foreign workers. For the execution of his decree of 21-3-1942 the Fuehrer has given me for my further tasks more authority, particularly empowering me to use my own judgement in taking all measures in the Reich and in the occupied Eastern territories in order to insure under any circumstances an organized employment of labor for the German armament industry." In his "Program for the Employment of Labor" of 24-4-1942 (Doc. No. 016-PS, USA 168) he emphasizes the regional employment offices are in charge of all technical and administrative matters of labor employment coming under the exclusive competence and responsibility of the General Plenipotentiary for the Employment of Labor. The defense of Sauckel is not my task. But may I point out that he also did not take over his great and difficult task with feeling of hatred and intentions of

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enslavement. In his program for the employment of labor just mentioned he says for instance: "Everything has to be avoided which, beyond the shortages and hardships caused by war conditions, would aggravate and even cause unnecessary sufferings to foreign male and female workers during their stay in Germany. It stands to reason to make their presence and their work in Germany, without any loss for ourselves, as bearable as possible. On that point Sauckel and Rosenberg shared the same opinion.

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Neither is it my task to state and to prove that many hundred thousands of foreign workers have found their good fortune in Germany, that in fact numberless persons were better off here than in their fatherland, but I am only concerned with the bad conditions which have been charged to the defendant Rosenberg.

I come now to the Central Agency for Nationals of the Eastern Territories. Several days ago, I read the affidavit of Dr. Albert Beil. Essentially it contains an authoritative statement of whatever can be said about that subject. Therefore, I should like to omit that subject, Central Agency for Nationals of the Eastern Territories, and ask the Tribunal to take judicial notice of it.

To refute the accusation that Rosenberg was active as protagonist of the system of hatred and barbarism, of denying human rights and of enslavement, I must add the following. Rosenberg received further unfavorable reports one being the report of the 7th of October 1942, about the bad treatment of Ukrainian skilled workers. Abuses in recruiting and during transportation were pointed out : the workers were frequently dragged out of their beds at night and locked up in cellars until the time of their departure; threats and blows by the rural militia were a matter of course; food brought from home by the skilled workers was often taken from them by the militia; during transportation to Germany neglects and transgressions on the part of the escorting units occurred, etc.

Rosenberg had no authority whatsoever to intervene in those matters, but he tried to do so in a letter of 21 December 1942 to Sauckel. Rosenberg first admits his fundamental accord with Sauckel, but after a few tactical and polite cliches, he complains seriously and urgently about the methods used in the employment of labor :"I must emphatically request for reasons of my responsibility for the occupied Eastern territories that any methods to supply the required contingents be excluded, if I or my associates might be accused one day of tolerating them and for their consequences."

Rosenberg further states that he empowered the Reich Commissar for the Ukraine to make use, so far as required, of his soveriegn right by giving attention to the elimination of recruiting methods which were running counter to the interests of warfare and war economy in the occupied territories.

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He, Rosenberg, and the Reich Commissars could not help being surprised that in numerous instances measures which should have been determined by civilian authorities were first communicated to him by the police or other offices. Without coordination of their mutual wished , he, Rosenberg, was unfortunately unable to accept the joint responsibility for consequences resulting from these reported conditions. In conclusion Rosenberg expressed the wish to put an early and to such conditions for the sake of their common interest Rosenberg also tried a personal consultation with Sauckel, and got Sauckel to promise that he would do everything to bring about a fair solution of all these questions, in a conversation of 14 April 1942. It was beyond Rosenberg's power and authority to do more. His secret opponent, supported by higher authorities, was Reich Commissar Kech, who was indeed the chief culprit in the cruel recruiting and employment methods for Eastern workers and whose influence Rosenberg was unable to counteract.

When the prosecutor Brudno on 9 January 1946 charges the defendant with protesting against these methods not for humanitarian reasons but for the sake of political expedience, I can only say that in my opinion one cannot simply maintain that the defendant Rosenberg is devoid of any human qualities without some sound reasons.

As an example of the defendant's particular bestiality the so-called "Hay Action" has been repeatedly pointed out by the prosecution, in 031-PS. It concerned the intention of the Army Group "Center" to evacuate 40 to 50 thousand juveniles from the area of operation, as they represented a considerable burden to the area of operation and besides were in the majority without any parental supervision. Villages for children were to be established behind the front lines under native supervision. One of these villages had already preven its value. It was expected that through the Organization Todt, its being a particularly appropriate organization due to its technical and other possibilities, the juveniles would be introduced to German handicraft first as apprentices in order to employ them as skilled workers after two years training. At first Rosenberg, as the Reich Minister for the occupied territories of the Eastern, was against it, because he feared that the action might be considered as a deportation of children and on the other hand because the juveniles did not represent a considerable increase of military strength.

The chief of the political operational staff approached Rosenberg again that the army group "Center" attached particular importance to the fact that the children should reach the Reich not by the authority of the General Plenipotentiary for the employment of Labor, but through the agency of the Reich Minister for the East, as only then could they be assured a correct treatment.

The Army Group wanted the action to be carried out under the most loyal conditions and wanted special regulations to be issued with regard to the taking care of these people, as regards mail service between them and their parents, etc. In the event of a possible re-occupation of the territory the East Ministry could then let the boys go back. Together with their parents they would certainly form a positive element during the subsequent re-consturction of the territory. Finally as reason for the second request addressed to the Minister it was stated in addition that the boys, to be sure, would not essentially contribute to strengthening the military power of the enemy, but that the important factor in this case was the long-range weakening of the biological strength of the enemy; not only the Reichsfuehrer SS but also the Fuehrer had expressed themselves to this effect. Rosenberg finally gave his consent to this action.

To this it may be said that it concerned a field which was not at all within the jurisdiction of Rosenberg's administration; he did not want to destroy foreign nationals even if biological weakening was given him as a reason, -a reason which he himself did not recognize. Instead he wanted to have the children educated and trained in order to bring them with their parents back to their homes later on. That is more or less the contrary of what de defendant is criminally charged with. Later on, late in summer 1943, Rosenber visited the Junkers's plant in Dessau where approximately 4700 young white Ruthenian craftsmen were employed, and also visited a White Ruthenian children's camp. The clothing of young workmen was irreprochable, they were industrious, enjoyed the best treatment and got along very well with the Germans. As Rosenberg was able to see for himself the young people were taught languages and mathematics by Russian teachers. The children were cared for in forest camps by White Ruthenian mothers and women teachers. The figure of 40 000, moreover, was never attained, in fact, barely half of it.

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The attempt of the prosecution in this instance to appeal especially and to the disadvantage of the defendant, t considerations of humanity cannot be successful in my estimation. For it is exactly this example which compelled me to point out the following in particular : we were in the midst of a war which was being conducted with terrible intensity on both parts. Is not war in itself "monstrous bestiality"? The "weakening of the biological strength of nations" is truly a fitting expression for the goal and purpose of the whole war, for that is what the thoughts and efforts of both belligerent parties were aimed at. It is impossible to think that one should want to forget this in judging the actions of the defendants, and that one should hold the defendants responsible not only for unleashing the war but in addition for the fact that war in its very essence constitutes a great crime on the part of mankind both against itself and against the laws of life.

The Prosecution contends that Rosenberg is guilty also in so far as it was he who issued the inhuman and barbarian decrees which aimed at carrying out the deportation of Soviet people into German slavery. This brings me to discuss the question as to whether the compulsory labor decree of 19 December 1941 and Rosenberg's other decrees concerning compulsory labor for the inhabitants of the Eastern territories were contrary to International Law.

The Eastern territories administered by Rosenberg had suffered a military occupation during the war. Through this "occupatio bellica" Germany realized a complete domination and had the same sovereignty as over her own territory. While according to previous conceptions of international law the occupying power could act arbitrarily without consideration of rights and laws the recent developments in international law eliminated the principle of force and brought victory to the principles of humanity and culture. Therefore, the formerly unlimited might of the occupying power was modified to limited rights.

The Hague Rules of Land Warffare stipulated in particular the legal duties of the occupying power. On the other hand, it is not ture either that the rules of land warfare set up only certain rights for the occupying powers. They merely set a balance to the intrisically unlimited right of the occupying

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power to exercise all powers deriving from territorial sovereignty over an occupied territory.

THE PRESIDENT: Would that be a convenient time to break off ?

(The Tribunal adjourned until 10 July 1946 at 1000Hours)